83-107

No. ____

Office-Supreme Court, U.S.
FILED
JUL 18 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMITTEE FOR AN INDEPENDENT P-I, a corporation; PEOPLE OPPOSED TO A ONE-NEWSPAPER TOWN, an association; COMMITTEE FOR A FREE PRESS, an association; LONGVIEW PUBLISHING COMPANY, a corporation; ROBINSON COMMUNICATIONS, INC., a corporation; and NORTHSHORE PUBLISHING COMPANY, a corporation,

Petitioners,

v.

WILLIAM FRENCH SMITH, Attorney General of the United States; THE HEARST CORPORATION, a corporation; and SEATTLE TIMES COMPANY, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can two newspaper proprietors obtain an antitrust exemption from the Attorney General under the Newspaper Preservation Act (hereinafter "the Act"), 15 U.S.C. § 1801 *et seq.*, so as to end commercial competition between themselves and engage in price-fixing, market allocation, and other conduct which would violate the Sherman Act, 15 U.S.C. §§ 1 and 2, where buyers who could and would continue the independent operation of the allegedly "failing" newspaper have sought to acquire it and are still available, and the applicant-owner has prevented the full exploration of that alternative by rebuffing all inquiries with the statement that the newspaper is not for sale?

2. Can two competing newspaper proprietors obtain an antitrust exemption for a proposed joint operating arrangement under the Act, 15 U.S.C. § 1801 *et seq.*, where the two newspapers will continue publishing independently if the exemption is denied, *i.e.*, there is no showing of a probable future closure by either of them?

3. Can the finding required under the Act, 15 U.S.C. § 1803(b), that approval of a proposed newspaper joint operating arrangement would "effectuate the policy and purpose" of the statute, be made where the editorial voices of smaller competing newspapers would be impaired by the proposed arrangement, and where the terms of the arrangement are unnecessarily destructive of competition?

4. In light of the freedom of the press guaranty of the First Amendment, can the federal government grant an extraordinary antitrust exemption to the two largest newspapers in a market, and thereby empower them to weaken or extinguish competing editorial voices of smaller newspapers in the same market, by licensing the two applicant newspapers to engage in collusive conduct which is forbidden to all the others by the criminal and civil provisions of the Sherman Act, 15 U.S.C. §§ 1 and 2?

5. Can that portion of the Act, 15 U.S.C. § 1803(b), which would permit an appointed official of the executive branch to decide which newspapers will receive favored treatment and which will not, according to his subjective notions of which applications would "effectuate the policy and purpose" of the statute, be allowed to stand in view of the constitutional prohibition of vague and overbroad delegations of licensing power in an area affecting the exercise of First Amendment rights?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray for a writ of certiorari to review a judgment entered by the United States Court of Appeals for the Ninth Circuit on April 21, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a)[1] is reported at 704 F.2d 467 (1983). The memorandum decision of the United

[1] The citation "App." refers to the appendix to this petition, which is separately printed. The citations "ER", "SER", and "DSER" refer

States District Court for the Western District of Washington is reproduced at App. 33a. The administrative order of the respondent Attorney General is reproduced at App. 53a.

JURISDICTION

The judgment in the Court of Appeals was entered on April 21, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment to the Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; the Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.*; the administrative regulations applicable to hearings conducted under the latter statute, 28 C.F.R. Part 48; and the section of the Administrative Procedure Act defining the scope of judicial review, 5 U.S.C. § 706, are set forth in the Appendix.

STATEMENT OF THE CASE

Summary

This is a case of first impression which presents issues of fundamental importance to the newspaper industry and the public under the First Amendment, the Sherman Act, and the Newspaper Preservation Act (hereinafter "the Act"). It is the first case of any description arising under the Act to reach a

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to the excerpt of record, the supplemental excerpt of record, and the defendants' supplemental excerpt of record. The citation "CR" refers to the District Court Clerk's record. Citations to the administrative hearing transcript are to "Tr.", followed by the page. Exhibits received in evidence at the administrative hearing are cited as "Int. [for Intervenors'] Ex.", "Division [for Antitrust Division] Ex.", "Hearst Ex.", and "Times Ex.", followed by the exhibit number.

court of appeals, and the first involving the Attorney General's statutory power to license newspaper joint operating arrangements to be decided by the federal courts at any level.

The action is for judicial review of an administrative order granting two newspaper proprietors a virtually permanent exemption from the antitrust laws. The United States District Court for the Western District of Washington, in which jurisdiction was vested by the provisions of 28 U.S.C. § 1331 and 5 U.S.C. §§ 702 and 703, set aside as contrary to law an order of the Attorney General which would grant antitrust immunity to a proposed joint operating arrangement ("JOA") between Seattle's two metropolitan daily newspapers. The opinion of the Court of Appeals, filed on April 21, 1983, reversed that judgment and would award the extraordinary antitrust exemption.

Petitioners, plaintiffs and appellees in the courts below, assert that the executive branch is barred by the First Amendment, and by a correct construction of the Act, from allowing the requested exemption. This Court is respectfully requested to grant the petition for a writ of certiorari, reverse the judgment of the Court of Appeals, and reinstate the judgment of the District Court.

The Sherman Act And The Newspaper Preservation Act

The Sherman Act of 1890, 15 U.S.C. § 1 *et seq.* (App. 200a), prohibits combinations and conspiracies in restraint of trade and monopolization of any part of commerce. A statute of fundamental importance to the American legal system, the Sherman Act is a "comprehensive charter of economic liberty" whose goals include "providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958).

The Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.* (App. 201a) was passed in 1970 following this Court's decision in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131

(1969). The Court in *Citizen Publishing* held that a JOA based upon price-fixing, fixed-formula profit pooling, and concerted division of markets by two newspaper competitors entailed Sherman Act § 1 violations which were "plain beyond peradventure" (*id.* at 135), and affirmed a district court order of divestiture. Congress thereafter provided for a limited antitrust exemption.

The Act distinguishes between pre-existing JOA's and those for which prospective approval is sought. The former are allowed an antitrust exemption if, at the time the arrangement was entered into, not more than one of the newspaper participants "was likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a). No administrative action is involved with respect to pre-existing JOA's. A proposed new JOA must be submitted to the Attorney General, who may approve it, but is not required to do so, if he determines that "not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter." 15 U.S.C. § 1803(b). A "failing newspaper" is defined as one "which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1802(5).

Before the present case arose there had been three JOA applications, relating to Anchorage, Chattanooga and Cincinnati, all smaller markets than Seattle. In Anchorage and Chattanooga the executive branch granted the applications without a hearing. In Anchorage, five years after the Attorney General determined that one of the two applicant papers was "failing," the JOA broke up over a disagreement; commercial competition then resumed and by the time of the hearing in the present case the formerly "failing" Anchorage newspaper had drawn nearly even with its competitor in circulation. (Tr. 361-5.) In Cincinnati a hearing was held and the JOA was then approved.

Federal court actions challenging the executive branch's approval of JOA's were filed regarding the Chattanooga and

Cincinnati applications, but were quickly settled. The case at bar thus involves the first judicial rulings on the merits concerning the Attorney General's prospective-licensing activity under the statute.

Proceedings Below

On March 27, 1981, respondents The Hearst Corporation ("Hearst") and Seattle Times Company ("Times") applied for approval of a proposed JOA between the Times and the Post-Intelligencer ("P-I"), for many years Seattle's only two metropolitan daily newspapers. (Hearst Ex. 1B-IV.)[2] The Attorney General ordered a hearing. He allowed petitioners to intervene as parties under 28 C.F.R. § 48.11, provided they did so through a single legal representative. (SER 12-13.) The petitioners include P-I employees, advertisers, readers, neighborhood and suburban newspaper publishers, and others who would be injured by implementation of the proposed JOA. (SER 12-13; ER 2-4).[3]

A three-and-one-half week hearing was held before an administrative law judge ("ALJ") in November, 1981. Following the hearing the Assistant Attorney General in Charge of the Antitrust Division ("AAG"), who is a party to the proceeding, 28 C.F.R. § 48.10(b), urged that the application be denied because it could not legally be granted. This marked the first

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[2] Both Seattle metropolitan dailies are affiliated with national newspaper chains. Hearst, the sole owner of the P-I, operates newspapers, magazines, radio stations, television stations, and other business enterprises. The Times is owned by the Blethen Corporation and by Knight-Ridder Newspapers, Inc. (through an affiliate), a major newspaper chain proprietor.

[3] The following listing is provided in compliance with Rule 28.1 of this Court: Longview Publishing Company, one of the petitioners, owns stock in three non-wholly-owned subsidiaries, *i.e.*, The Production Company, St. Helens Publishing Company, and Cowlitz Cablevision, Inc. Valley Publishing Company, a plaintiff below, has been dissolved and is not a petitioner.

time that the Antitrust Division had opposed a JOA application on its merits. (App. 156a.) The ALJ issued a recommendation that the application be approved, including proposed findings and conclusions. (App. 62a.)

The Antitrust Division filed strong exceptions (App. 154a) to the recommendation, stating that "[t]he legal errors we perceive here are not only of significance to the Seattle application, but also set an erroneous precedent for future proceedings under the Act." (App. 157a). However, the Attorney General issued on June 15, 1982, an order granting the application, to become effective ten days thereafter. (App. 53a.)[4]

Petitioners filed the present judicial review action on June 16, 1982, seeking declaratory and injunctive relief against the Attorney General. (App. 185a.) Upon petitioners' motion for an order postponing the effective date of the Attorney General's order, as provided for by 5 U.S.C. § 705, the Court ordered a sixty-day postponement to facilitate judicial review. (App. 194a.)

All parties moved for summary judgment. On August 27, 1982, the Court issued its memorandum decision and order granting petitioners' motion for summary judgment on the basis that the administrative order had been issued contrary to law in that, although qualified prospective buyers had sought and were still seeking to acquire the P-I, Hearst had refused to explore new ownership as a means of assuring continued publication of the newspaper without resorting to concerted restraints of trade. (App. 33a.) Judgment setting aside the

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[4] The Attorney General made no findings other than, or in addition to, those proposed by the ALJ. With the single exception of Finding 158 hereinafter noted, he merely adopted the ALJ's proposed findings and conclusions without changing them. (App. 55a-56a.) Accordingly, all references to the ALJ's findings or conclusions in this petition are to those of the Attorney General as well, since the two are identical (again, with the one exception noted).

administrative order was entered on August 30, 1982. (App. 52a.)

The respondents, defendants in the District Court, appealed, and petitioners cross-appealed as to additional grounds of alleged illegality which the District Court had not adopted. A three-judge panel of the Court of Appeals filed its opinion reversing the District Court on the finding of illegality, and affirming in the other respects, on April 21, 1983. (App. 1a.)

REASONS FOR GRANTING THE PETITION

Commercial Competition And Freedom Of The Press

The strong national policy favoring enforcement of the antitrust laws is especially important to a free and vigorous press. In *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), holding the Sherman Act applicable to anticompetitive agreements entered into by newspaper publishers, the Court said (emphasis added):

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information *from diverse and antagonistic sources* is essential to the welfare of the public, that a free press is a condition of a free society.

Commercial competition is vital to editorial quality and diversity. If the proposed JOA at bar were allowed, the two Seattle dailies would cease to be "diverse and antagonistic sources" and the P-I would become a commercial appendage to its dominant partner.[5] The P-I's editorial voice would be

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[5] The proposed arrangement is for fifty years with automatic ten-year renewals. (Hearst Ex. 1; SER 80-82.) It contains no provision for termination unless the venture proves unprofitable for three successive years, and thus amounts to a practically irreversible combination; the concerted market restraint could continue for decades

severely weakened through loss of its Sunday edition, loss of quality employees, loss of the commercial impetus to excel, and subjection to a restrictive "newshole" (ratio of news to advertising) formula. (Hearst Ex. 1; SER 46-48, 241, Tr. 3446-7.) At the same time, the proposed JOA would award the applicants concerted power over the market to the public's detriment. (App. 183a.)

The Proposed JOA Would Violate The Sherman Act, In The Absence Of An Exemption

The proposed JOA at issue would entail multiple *per se* violations of the Sherman Act §§ 1 and 2. It calls for the joint fixing of advertising rates (price-fixing), the joint fixing of circulation rates (price-fixing), the joint determination of areas of circulation (allocation of markets), a division of editorial times with each party refraining from publishing during the other's hours of publication (allocation of markets), the withdrawal of one competitor's Sunday newspaper (allocation of markets), fixed-formula profit-pooling, and a total cessation of commercial competition between the only two metropolitan dailies in Seattle (monopolization). Such conduct would ordinarily result in a felony indictment or a government civil action. "In this proceeding" as the AAG has pointed out, "the

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after the conditions originally claimed to justify it had ceased to exist. (*Id.*) It places commercial control of both newspapers in the hands of the Times, including rate-setting, establishment of combination rates, circulation rates and areas, advertising sales, establishment of zoned editions, promotion, and production. (*Id.*) It eliminates all commercial competition between the two papers and permits them to act concertedly through a management committee controlled by the Times. (*Id.*) It allocates markets by eliminating the P-I's Sunday edition, withdrawing the Times' Monday through Friday morning editions, and establishing exclusive publication hours for each participant. (*Id.*) And it allocates to each party a flat percentage of total combined earnings (approximately one-third to Hearst and two-thirds to Times), regardless of their individual circulations or advertising sales. (*Id.*)

Attorney General is being asked to approve not merely a limited, technical departure from the usual norms of business behavior, but a permanent license to engage in what could otherwise be seri s antitrust violations. . . ." (App. 182a.)

Exemptions From The Antitrust Laws Must Be Narrowly Construed

This Court has "long recognized that the antitrust laws represent a fundamental national economic policy." *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). The requirement that exemptions from the Sherman Act be narrowly construed applies to express statutory exemptions. *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956); *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286, 1302 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

Where Qualified Buyers Who Seek To Continue The Independent Operation Of The Newspaper Are Available, And The Owner Has Prevented The Exploration Of That Alternative By Rebuffing All Inquiries With The Statement That The Newspaper Is "Not For Sale," The Applicants Have Failed To Sustain Their Burden Of Proving That Competition-Preserving Alternatives To A JOA Are Unavailable

This case presents the spectacle of one of the nation's largest media proprietors fending off would-be buyers of its newspaper with one hand while holding out the other to the federal government for an antitrust exemption. The correct rule is the one adopted by the District Court: Where the record shows the availability of qualified buyers who seek to continue the newspaper's independent operation, the applicant cannot deliberately frustrate that alternative and still obtain an exemption.

The legislative history makes clear that Congress intended the exemption to be a last resort to prevent the actual closure

of a newspaper. "[T]he granting of an exemption from the antitrust law, in any industry, must be carefully limited. Caution is particularly necessary when the exemption applies to the news media." 116 *Cong. Rec.* 1795 (1970), statement of Senator Goldwater. The procedure for examining proposed future JOA's was meant to "act as a brake upon other newspapers which might otherwise prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition." 116 *Cong. Rec.* 2006 (1970), statement of Senator Hruska. "[T]he future availability of the antitrust exemption for newspapers in other cities should be limited only to those situations where a joint newspaper operating arrangement is demonstrably essential to prevent a newspaper failure . . ." 116 *Cong. Rec.* 23148 (1970), statement of Representative McCulloch. The only JOA's contemplated were those "necessary to save one or the other or both [newspapers] from going out of business." S. Rep. No. 535, 91st Cong., 1st Sess. (1969), at 15. An exemption would be considered only where necessary to prevent an actual withdrawal from publication — where "the choice plainly narrows down to the survival" of the applicant newspaper. 116 *Cong. Rec.* 1795 (1970), statement of Senator Goldwater.

As under the Bank Merger Act, 12 U.S.C. § 1828, to which Congress referred in enacting the statute at bar, a refusal to explore the alternative of a sale to new ownership precludes the granting of an antitrust exemption. Congress intended that a newspaper being sought by well-qualified and well-financed buyers would not be deemed "in probable danger of financial failure." According to the Senate Report, when "a newspaper is failing . . . it is almost impossible to find an outside buyer." S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969). Similarly, Senator Inouye stated that "[T]here is no market for independent ownership of a failing paper. . . ." 116 *Cong. Rec.* 1786 (1970). *See also* 116 *Cong. Rec.* 23145 (1970) (remarks of Rep. Kastenmeier).[5]

[5] Accordingly, in the Cincinnati JOA proceeding, Administrative Law Judge Moore concluded: "In passing the Newspaper Preserva-

Congress also plainly intended that the standards applicable under the Bank Merger Act, 12 U.S.C. § 1828, as enunciated by this Court in the then-recent case of *United States* v. *Third National Bank*, 390 U.S. 171 (1968), should apply. *See* Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 7-8 (1969); S. Rep. No. 535, 91st Cong., 1st Sess. 2 (1969); 116 *Cong. Rec.* 23146 (1970). Those standards require that a merger be disapproved unless the proponents "reliably establish the unavailability of alternative solutions." *Third National Bank*, *supra*, 390 U.S. at 190.

In the present case the ALJ made detailed findings that Hearst had insisted at all times that the P-I is not for sale (Finding 156, App. 135a); that a series of responsible would-be buyers had approached Hearst seeking to purchase the newspaper before and even during the hearing, but had been told that it was not for sale (Finding 157, App. 135a-136a);[7] and that "considering that the Post-Intelligencer is not, and has not been for sale, and that all inquiries regarding possible purchase have been rebuffed by The Hearst Corporation with statements to that effect, and that responsible prospective purchas-

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tion Act, Congress assumed that by the time a newspaper had declined to the point at which it would be eligible to enter into a joint operating arrangement, alternative purchasers would not be available." *Recommended Decision of ALJ Moore* at 126.

[7] The would-be buyers shown to be available at the time of the hearing were John E. Cunningham, a Seattle businessman and former Congressman; Donald Snellman, a Seattle industrialist; and Rupert Murdoch, an international newspaper publisher. *See* App. 135a-136a and Division Ex. 56, Int. Ex. 355, Tr. 4203, and Tr. 2222-24. Other would-be buyers who had been rebuffed by Hearst in the recent past were Karl Eller, whose company owned several newspapers including the Oakland Tribune and the Cincinnati Inquirer; Philip Bailey, a Seattle businessman and weekly newspaper publisher; and Joe Albritton, a newspaper proprietor. *See* App. 135a-136a and Tr. 2767, 2773 and 2787; Int. Ex. 329A; Tr. 2221-22, 2781-82; Int. Ex. 34; and Tr. 2833-37.

ers nevertheless continue to appear and express an interest in buying the Post-Intelligencer, it must be concluded that the Post-Intelligencer could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily." (Finding 158, App. 136a.)*

Two basic errors of law were committed by the Attorney General in dealing with this issue. First, he assumed that Congress did not intend the standards of the Bank Merger Act to be applicable: "There is nothing in the legislative history of the Newspaper Preservation Act as a whole to suggest that Congress intended that the standards used for judging bank mergers were to be applied to newspapers." (App. 142a.) Second, he assumed there was no requirement that a sale to new ownership be considered as a competition-preserving alternative: The applicant "is not required . . . to demonstrate that [the newspaper] cannot be sold to a buyer willing and able to continue it in operation as an independent editorial voice. . . ." (App. 140a.)

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* The Attorney General adopted Findings 156 and 157 but refused to adopt Finding 158. (App. 55a-56a.) The District Court ruled that his rejection of Finding 158 was unsupportable under either the "arbitrary and capricious" or "substantial evidence" standard of judicial review. (App. 37a-38a.) The Court of Appeals ruled that the Attorney General was not required by the evidence to adopt Finding 158, but that the presence or absence of that finding was not decisive in any event. (App. 13a.) As shown in this petition, Findings 156 and 157 are sufficient in themselves to require denial of the application, although Finding 158 was also compelled by the evidence. The correct standard of review of agency findings is that where the evidence as a whole shows them to be unreasonable the court will reverse them. *E.g., Farmers Co-Operative Co.* v. *NLRB*, 208 F.2d 296, 304 (8th Cir. 1953); *Kelly* v. *Railroad Retirement Board*, 625 F.2d 486, 495 (3rd Cir. 1980); B. Schwartz, *Administrative Law* 663 (1976). The rules of law to be applied are for the courts to decide and enforce. 5 U.S.C. § 706; *Allied Chemical & Alkali Workers* v. *P.P.G. Co.*, 404 U.S. 157, 182 (1971).

The District Court correctly overturned the challenged order on both points. (App. 33a.) The Court of Appeals has reversed on the basis that, in its view, Hearst's rejection of the sale alternative was excusable because there was insufficient proof that a new owner would succeed, stating:

> In the absence of a showing that there is a likelihood new management would succeed, Hearst's failure to consider purchase inquiries lost importance. We therefore reverse the district court's holding.

(App. 21a.)

This disposition of the matter is in error. It would allow proprietors to gain antitrust exemptions for newspapers which could be operated successfully by others simply by rejecting the available sale alternative out of hand and thus causing their own weak performance, rather than the newspaper's true potential, to become the measure of the publication's future prospects.

New management cannot adequately be consulted, nor its prospects assessed, unless it is given a motive to pursue the matter through an expressed or required willingness to consider a sale. The District Court correctly held that where the owner flatly rebuffs all would-be buyers by telling them the newspaper is not for sale, "[t]here has been no fair opportunity for prospective buyers to prepare and present their plans to make the [newspaper] profitable." (App. 46a.)

For the same reason the Circuit Court's reliance upon a statement by the ALJ that "although some of the witnesses in this proceeding were critical of the handling of the Post-Intelligencer, the evidence does not establish that new management would be any more successful than Hearst and current management of the Post-Intelligencer in returning it to profitability" is misplaced. First, the statement erroneously reverses the burden of proof which is placed upon the applicants by 28 C.F.R. § 48.10(a)(4). Second, it ignores the erroneous exclusion by the ALJ of the proffered testimony of Donald Snellman, a Seattle industrialist who made his desire to buy

the P-I known during the last week of the hearing. (Tr. 4190, 4203.)[9] Third, it is totally unrealistic because it overlooks the fact that business people will not come forward with specific offers, or with plans to make an enterprise succeed, when they are told it would be futile to do so. Hearst effectively told the would-be buyers that even if they could succeed it would not sell to them. As stated by the AAG, "Hearst's unwillingness to enter into serious negotiations or cooperate with potential buyers of the P-I made it difficult for them to formulate concrete proposals for purchase and future operation of the paper. The fact that qualified purchasers nonetheless continued to come forward is strong and unrebutted evidence of the P-I's saleability." (App. 179a.)

Time after time, the record shows, new ownership has brought success to struggling newspapers. An especially striking example, and one which shows the folly of administrative findings of "probable danger of financial failure" before alternatives have been explored, is the recent experience in Anchorage, Alaska, a much smaller market than Seattle.[10] Other examples include the San Antonio News and Express, Detroit Free Press, Rocky Mountain News, Chicago Sun-

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[9] The ALJ stated that he was "approaching it from the standpoint that I do not read the Newspaper Preservation Act as putting any requirement on any papers seeking a JOA that that paper offer itself up for sale. . . ." (Tr. 4190.)

[10] In 1974 the Anchorage News was in a position much inferior to the current position of the P-I. Its circulation share of field was about 25% against the Anchorage Time's 75%; the two proprietors applied for a JOA; and the application was granted pursuant to an Attorney General's finding that the News was in "probable danger of financial failure." (Tr. 361-362.) Following that, the Times operated the joint agency which put out both papers. (Tr. 363.) Then the JOA partners had a falling-out and a lawsuit which was settled by dissolution of the JOA in 1978. (*Id.*) The News had lost its Sunday edition in the JOA, and by 1978 its market share had shrunk to about 20%. (*Id.*) By the standards promulgated by Hearst's expert, and later adopted by the Court of Appeals herein, the News was past the point of "probable

Times, Sacramento Union, St. Petersburg Independent, New York Times, and Newark Ledger. (Tr. 354-58, SER 203-05.)

The new ownership alternative is especially compelling here in light of Hearst's nationwide record. According to the company's own expert, virtually every metropolitan daily in the chain which faces competition has declined to the point of "probable danger of financial failure." (Tr. 340, 354-8.) The Hearst newspapers thus described as "failing" operate in markets which are clearly able to support competition.[11]

The correct rule is that where qualified buyers come forward, the applicant-owner must be willing to consider a sale so as to permit the new ownership alternative to be explored. If the owner refuses to do that—as Hearst did here—the applicants' burden of negating the availability of competition-preserving alternatives cannot be met. That is the District Court's rule in the present case, and it fits the legislative intent.[12] Congress did not intend to permit an owner

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danger of financial failure." (Tr. 361-65.) In early 1979, however, a new owner bought a controlling interest in the News, acquired presses and a building, and resumed commercial competition with the Times. The News's circulation nearly tripled in one year. (Tr. 364.) By 1981 the News had risen in just over two years from a one-to-five circulation ratio to a three-to-four ratio and was competing vigorously. (Tr. 365.)

[11] Petitioners made a timely request that the Court of Appeals take judicial notice that in December, 1982, a year after the administrative hearing, Hearst sold its daily newspaper in Boston to News America Publishing Company. The court declined the request solely because it considered the fact "not relevant." (App. 22a, n.10.) This too was error. The Boston sale is relevant because it illustrates that the future of a Hearst daily claimed by the management to be "failing" (Tr. 333, 339), where the competitor rejects a JOA, is not closure but a sale to vigorous new ownership.

[12] The rule differs from the "failing company doctrine," which applies to mergers outside the newspaper field. The latter requires proof that the failing company is on the brink of liquidation, that is

deliberately to block all attempts by other entrepreneurs to acquire its newspaper, and then claim the enterprise was "failing" while others who recognized its value and advantages were still attempting to purchase it.

A Newspaper Cannot Be Deemed "In Probable Danger Of Financial Failure" When It Will Continue Independent Operation If An Exemption Is Denied

Where the evidence fails to show that the two applicant newspapers will do anything other than continue publishing competitively without an antitrust exemption—*i.e.*, there is no showing of a probable future closure—the burden of proving the need for an exemption has not been met and the application must be denied.

The Court of Appeals has erroneously failed to apply this rule. It has used an artificial definition of "probable danger of financial failure" and has incorrectly assumed that a JOA could be allowed even where both applicant newspapers would continue publishing without one. It has further sanctioned the erroneous exclusion of evidence, offered by the Antitrust Division, to prove that Hearst in fact obtains net financial benefits from operating the P-I.

The Attorney General conceded in the District Court that he had "made no finding that the P-I was faced with actual closure." (CR 63, p. 6, lines 7-8.) The ALJ disclaimed any finding that the P-I is in practical danger of closing, stating that "it is not clear what will be the fate of the Post-Intelligencer if the joint operating arrangement is disapproved." (App. 140a.)

The applicants insisted that they were not required to show any likelihood that the P-I will cease publishing without a JOA. The ALJ adopted that view, saying that the Act "does not

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prospects for reorganization are dim or nonexistent, and that it has affirmatively sought other buyers without success, none of which is required by the District Court's rule herein. *Citizen Publishing Co. v. United States*, 394 U.S. 131, 138 (1969).

require Hearst to make this showing." (App. 140a.) Although the Antitrust Division vigorously disagreed and presented legislative history showing that proof of a probable closure was essential (App. 157a-160a), the Attorney General adopted the ALJ's legal conclusion.

The legislative history shows that the statutory definition of a "failing newspaper" as one "in probable danger of financial failure" (15 U.S.C. §§ 1802(5), 1803(b)) requires proof that an actual closure and the loss of an editorial voice are probable. *See* the statements of Congressional intent quoted *supra*, pp. 10-11. It is not sufficient that past accounting losses be shown or future ones predicted.

The Court of Appeals has recognized that Hearst or a successor will continue to operate the P-I competitively if the exemption is denied, stating: "For purposes of this issue, we accept the Committee's assertion that Hearst never considered closing the P-I, even should the joint operating agreement not be allowed." (App. 23a.)

The court below has also found that "it is beyond the question that the purpose of the Act is to prevent the *closure* of the ailing newspaper . . . We adhere to our belief that Congress intended the phrase 'probable danger of failure' to mean a probability that the paper would be closed and an editorial voice lost." (App. 23a-24a.)

However, the opinion below has then gone on to conclude that the statutory phrase, "regardless of its ownership or affiliations," which precedes the words "probable danger of financial failure" in 15 U.S.C. § 1802(5), permits the Seattle exemption. The Court's theory is that "without the backing of Hearst, [the P-I] would probably close" (App. 23a.) Reliance is placed upon legislative history indicating that "the presence or absence of financial support from other newspaper business activities in other cities or from other financial activities of the owners" are not to be considered. (App. 24a-25a.)

This approach is in error for the following reasons:

First, it is plain from the legislative history that the phrase "regardless of ownership or affiliations" in 15 U.S.C. § 1802(5) means only that a "deep pocket" parent should not be required to deplete its financial assets before seeking a JOA; it does *not* mean that an owner who is operating the paper profitably or without actual cost to itself, and who will not close it, could become eligible. (App. 161a-163a.)

Second, there is no "backing" or "financial support" involved where the newspaper's owner has actually been gaining net benefits from its operation. That is the case here, as shown by the Antitrust Division's accounting evidence which the Attorney General erroneously refused to receive or consider. With incremental analysis, as explained by the AAG, "[t]he businessman simply asks himself whether his overall business would, on balance, gain or lose if the unit or operation were shut down." (App. 161a.) The Division's highly-qualified accounting expert testified in an offer of proof that Hearst in fact has been benefitting financially from owning and operating the P-I. (App. 171a-177a.) Accordingly, there is no real prospect of a closure. The ALJ recognized that according to this evidence "the Post-Intelligencer during the years 1976 through 1980 returned a net benefit to its owner, Hearst." (App. 146a). Nevertheless he rejected the offer of proof, and refused to consider incremental analysis, because the statutory definition of a "failing newspaper" includes the phrase "regardless of its ownership or affiliations." 15 U.S.C. § 1802(5).

There is accordingly no finding in the record as to whether Hearst has been obtaining net financial benefits from the P-I.

The ruling excluding the Antitrust Division's accounting evidence was in error because it ignored the central issue of whether the newspaper would continue publishing without a JOA. As the AAG pointed out, "Congress did not intend to ignore that issue in favor of a wholly artificial and speculative inquiry into the prospects of an independent P-I that does not exist." (App. 163a.)

The reasons why Hearst has never considered closing the P-I (SER 492-94; Tr. 1456, 1538, 2476, 1724, 2198-99) are clear. The owner has realized net benefits from the newspaper when realistic accounting methods are applied, *supra*. The newspaper enjoys the morning position (Tr. 271-72, 378-79) in an exceptionally fast-growing and desirable market (App. 79a-80a, ER 39-40) which is fully capable of sustaining daily newspaper competition (SER 302-6). Hearst itself saw the P-I as close to profitability in the years immediately preceding the JOA application. It described the newspaper as holding a "unique position in the Hearst organization" and as the likeliest metropolitan daily to attain early commercial success. (Int. Ex. 155C; Tr. 1454-55.) In 1978 it noted that "[a]ll vital signs are improving for the unit," and in 1979 that the Seattle "market is exceptionally strong." (Int. Exs. 42, 55.) Hearst's newspaper division chief expected a 1980 P-I profit unless a general recession occurred. (Int. Ex. 67.) Improvements in management which the uncontradicted evidence shows were urgently requested for years by Hearst's local executives, but rejected by the New York office, have succeeded in other cities but remain untried at the P-I. (TR. 361-65, 3554-5, SER 100-27.)[13] Qualified would-be buyers continue to appear, and Hearst can sell the P-I for fair market value whenever it chooses to do so, *supra*.

The AAG has aptly pointed out that the slack definition of the phrase "probable danger of financial failure" subsequently adopted by the Court of Appeals "is highly artificial, requiring

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[13] The Court of Appeals has erred in this regard by confining the opponents of a proposed JOA to showing "unreasonable" management practices. (App. 21a.) While there was testimony from several of Hearst's own executives and editors that it had mismanaged the P-I (SER 89-146, 326-28), and Hearst's expert testified that virtually every competitive-market daily in the company's chain has fallen into "probable danger of financial failure" (Tr. 340, 354-8), it should not be necessary to litigate whether management was "unreasonable." It is enough that *different* management—without characterizing what has gone before—should be tried.

only a showing of past accounting losses on financial statements, without regard to the actual, practical danger of economic failure and the loss of an editorial voice. . . ." (App. 157a-158a.)

The net result of the Ninth Circuit's interpretation of the statutory phrase is to allow a federally-licensed combination in restraint of trade to be imposed on a market although both applicant newspapers would continue publishing without one, and although both operate with net financial benefits to their owners. Such an interpretation should not be allowed to stand.

The Required Finding That Approval Of The Proposed JOA Would "Effectuate The Policy And Purpose" Of The Act Cannot Be Made Where The Editorial Voices Of Smaller Competing Newspapers Would Be Impaired, And Where The Terms Of The Proposed Arrangement Are Unnecessarily Anticompetitive

The second part of the two-part test set out in 15 U.S.C. § 1803(b) provides that before approval of a JOA can be granted "the Attorney General shall determine . . . that approval of such arrangement would effectuate the policy and purpose of this chapter." That requirement cannot be met where, as here, implementation of the proposed JOA would impair or silence the editorial voices of smaller newspapers in the market. The statutory purpose is "to preserve the publication of newspapers"—not to silence them. 15 U.S.C. § 1801.

The Court of Appeals, following the Attorney General, has held that even if the proposed federal license to combine in restraint of trade would have the effect of eliminating smaller newspapers' voices, that fact is irrelevant. The court below has asked: "[M]ust the Attorney General determine that the proposed JOA . . . would not impair the editorial voices of smaller newspapers in the affected market?" (App. 7a.) Its negative answer is in error.

The correct rule is that the application must be denied where the probable effect of allowing an exemption would be to harm

other newspapers to the point where their editorial voices would be substantially diminished or silenced. Evidence should be taken and findings made on that issue.

Although the Attorney General has declined to make findings on the subject, the record here shows unmistakably that neighborhood and suburban newspapers will be harmed. The use of combination advertising rates, price-fixing, market allocation, formula profit-pooling, and other practices which would be allowed to the two largest competitors in the market, while being denied to all others, would substantially impair the editorial voices of the smaller newspapers. (SER 48-59.) Two of the targeted proprietors testified in detail to the harm the JOA will inflict upon them (Tr. 3317-84, 3966-92). The applicants admitted that one purpose of their proposed arrangement is to gain competitive advantages over the smaller papers. (Tr. 385-93, 1468.)

The injuries which the proposed JOA would inflict on the smaller papers have been proved by evidence which amply meets the Clayton Act requirement for a private party to obtain an injunction—*i.e.*, a showing of "significant threat of injury from an impending violation of the antitrust laws." *E.g.*, *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 468 F. Supp. 154 (D.C. Cal. 1979); *National Constructors Ass'n.* v. *National Elec. Contractors Ass'n, Inc.*, 498 F. Supp. 510 (D.C. Md. 1980).

The Attorney General adopted the ALJ's statement that "it is possible that some suburban newspapers may be put at a disadvantage by the joint operating arrangement . . ." (App. 151a.) But he made no formal findings on the subject because he believed, following the ALJ, that

> . . . The effects of the joint operating arrangement between the Post-Intelligencer and the Seattle Times, if any, on competing media are not relevant to the determination of whether that arrangement should be approved under the terms of the Newspaper Preservation Act.

(App. 145a.)

The Court of Appeals, similarly, has assumed that smaller editorial voices would be injured but that there is no need to determine whether the injury would be serious or fatal. (App. 25a-28a.)

Congress could not constitutionally have intended such a draconian result. Its expressed goal was to promote a *diversity* of editorial voices. As stated by Senator Fong, "we must foster editorial competition and diversity as much as possible in every community." 116 *Cong. Rec.* 1787 (1970). That goal would be defeated where a proposed JOA would have unduly destructive effects upon smaller newspapers.[14]

Congress intended that probable effects upon competing newspapers should be considered. *See, e.g., Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st. Cong., 1st Sess. 4-5 (1969). Nothing in the legislative history supports the view of the court below that harm to competing editorial voices, no matter how grievous, is excluded by law from the factors to be considered by the Attorney General.[15]

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[14] It is no answer to say, as the court below does, that "other newspapers in the Seattle area, large or small, may participate in a joint operating agreement if they qualify." (App. 29a.) In reality they cannot do so because they have no potential JOA partners. The government in any event cannot lawfully push them away from competition and toward combination. Nor is it an answer to say that commercial victims of the combination would be able to sue on the basis of the antitrust rules governing a single actor, since the government here purports to license *collusive* conduct which in itself would be harmful. (CR 61, App. H, p. IV-10-12; SER 71-73.)

[15] The Ninth Circuit's quotation from a House Report that "[a]lthough commercial competition may have been affected to some extent by these arrangements, they have achieved the more important objective of preserving separate editorial voices," H. Rep. No. 1193 at 3549, is inapposite. The context makes clear that the Report was referring to commercial competition *among the parties* to joint operating arrangements, not to adverse effects upon competition by third party newspapers.

The Court of Appeals has also asked: "[M]ust the Attorney General determine that the proposed JOA is not unnecessarily anticompetitive . . .?" Its negative answer again is in error.

If the proposed arrangement is *unnecessarily* destructive of competition between the two applicants, it should clearly be disapproved. Antitrust exemptions must be narrowly construed, *supra*. There exists no antitrust exemption in which the exempted parties pass through a golden door following which the anticompetitive sweep of their arrangements is left to them.[16] The Attorney General's refusal to consider whether the terms of the proposed arrangement at bar were needlessly anticompetitive was in error.

In the severity, length, and comprehensiveness of its Sherman Act § 1 and § 2 violations, the proposed Seattle JOA goes far beyond anything which could conceivably be necessary to assure the P-I's continued publication. Its duration would be far longer than that of any other arrangement yet submitted for approval (50 years plus extensions, as against 20 and 30 years for Chattanooga and Cincinnati). It would amount to a virtually permanent combination. Perpetual antitrust immunity would be provided regardless of whether the conditions originally claimed to support it (*i.e.*, a "failing" P-I) ceased to exist. (Hearst Ex. 1; SER 80-82.) The proposed JOA contains an editorial restraint on the P-I (a restrictive "newshole" formula) as well as commercial restraints. (SER 39-45.) As stated by the Newspaper Guild local in its brief opposing the application (SER 241):

> The structure of the JOA assures that fifty years hence the P-I will be in no better condition to compete as an independent entity than it is now. In fact, this particular

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[16] For example, agricultural cooperatives exempted by the Capper-Volstead Act run afoul of the Sherman Act if their concerted actions exceed the legitimate objects of the exemption. *Maryland and Virginia Milk Producers Ass'n. v. United States*, 362 U.S. 458 (1960).

JOA is unprecedented in its scope among the applications considered under the Act.

The argument that Congress left it to the proprietors to draft whatever they choose and have it automatically approved by the Attorney General once the "failing" condition of one applicant was demonstrated, accepted by the court below, could not be more starkly at odds with long-standing antitrust policy. Such a rule would invite proprietors to write the most anticompetitive agreements possible in making applications under the Act.

The Act Is Unconstitutional Under The First Amendment As Applied Herein

The Court of Appeals has assumed that the federal government can grant two metropolitan dailies an exemption from generally-applicable economic regulation even where the result is to injure or silence the voices of smaller newspapers, published in the same market, which must still carry the regulatory burden. That holding is in error because the First Amendment prohibits disparate economic regulation which favors some newspapers over others. *Minneapolis Star and Tribune Co.* v. *Minnesota Commissioner of Revenue*, 75 L.Ed.2d 295 (1983).

The Amendment is not limited, as the court below would have it, to proscribing direct restraints on the content of speech. The Ninth Circuit's conclusion that "we do not find first amendment rights implicated" (App. 29a) is plain error.

Seattle is not a two-newspaper market, but a multi-newspaper market. While the applicant metropolitan dailies are deeply entrenched, the editorial voices of the suburban and neighborhood newspapers have equal constitutional importance.

The record shows that smaller papers would be injured or silenced by the proposed JOA, *supra*. In the view of the court below, that fact is irrelevant because Congress was entitled to

tip the scales for the applicants and against the others. The opinion states (App. 28a):

> Congress recognized that the approval of JOA may have anticompetitive ramifications. This was a national policy choice Congress was free to make . . .
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> * * *
>
> At most, the Act *may* affect the number of "readers" a newspaper has. But that the Act may have such an effect is no different, in our view, than any other economic regulation of the newspaper industry.

In so ruling, the Court of Appeals has failed to recognize that the "economic regulation" imposed on the Seattle market by the challenged administrative order would be *unequal* among newspapers; that Congress is not free to burden some newspapers with "anticompetitive ramifications" resulting from preferential treatment of others; and that discriminatory governmental intervention in the area of the press which "may affect the number of 'readers' a newspaper has" is prohibited. The opinion relies on the notion that "[w]hat Congress has passed, it may repeal." (App. 29a.) But Congress has not repealed the Sherman Act. Nor has it decreed that the Sherman Act will not be applied to newspapers. What is attempted here is an administrative exemption of the two largest Seattle newspapers from the Sherman Act so as to allow them to combine in restraint of trade (price-fixing, allocation of markets, and the like), while forbidding that conduct to all others in the market, to their injury. That cannot constitutionally be done.

This Court held in *Minneapolis Star and Tribune Co.* v. *Minnesota Commissioner of Revenue*, *supra*, 75 L.Ed.2d 295 (1983), that government cannot employ economic measures which treat one group of newspapers more favorably than another because such diverse treatment jeopardizes the First

Amendment rights of the disfavored newspapers.[17] A Minnesota use tax on paper and ink consumed in newspaper production was held unconstitutional both because the tax singled out the press for economic regulation different from that imposed upon businesses generally, and because its burden fell differently on different newspapers. The Court stated, 75 L.Ed.2d at 308-9:

> Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax.

The economic burden of having to comply with the antitrust laws is as real as the burden of paying a tax. Just as Congress could not selectively free the dominant dailies from a general tax, it cannot free them from antitrust regulation in a market inhabited by other newspapers which continue to bear the burden of that regulation.

The *Minnesota Star* decision is but the latest of many in which the Court has made clear that the First Amendment prohibits regulations having the *effect* of chilling speech, or of favoring some speakers over others. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).[18] The government's intent is not controlling. In fact, as the

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[17] The Court of Appeals has failed to mention the *Minneapolis Star* decision although petitioners timely brought it to the panel's attention by a letter sent on April 1, 1983, three days after the decision was announced. The opinion below was filed nearly three weeks later.

[18] The content-neutral license tax imposed upon smaller newspapers, but not larger ones, in *Grosjean* "was held invalid because of its direct tendency to restrict circulation." *Lovell* v. *Griffin*, *supra*, 303 U.S. at 452. While the Court in *Grosjean* noted the political motivation of the measure, the outcome today would be the same without it because the prohibited effect upon freedom of the press would be the same. *See Minnesota Star*, *supra*, 75 L. Ed. 2d 295 (1983).

Court stated in *NAACP* v. *Alabama*, 357 U.S. 449, 461-2 (1958),

> [t]he governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the *consequence* of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment.

(Emphasis added.) *See also Louisiana* v. *NAACP*, 366 U.S. 293, 297 (1961) ("[R]egulatory measures . . . cannot be employed in purpose *or in effect* to stifle, penalize, or curb the exercise of First Amendment rights.") (Emphasis added).

It has long been the rule that economic impact can constitute a forbidden abridgement of First Amendment rights. *E.g.*, *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

In the area of the First Amendment, Congress does not have the freedom to choose that it possesses elsewhere. It cannot choose to foster two editorial voices downtown at the expense of a diversity of editorial voices throughout the metropolitan area. *Compare Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), and *Mills* v. *Alabama*, 384 U.S. 214 (1966), with *Schneider* v. *Irvington*, 308 U.S. 147 (1939).

The Licensing Provision Of The Statute Is Unconstitutional On Its Face Because Of Its Vague And Overbroad Delegation Of Power In An Area Affecting First Amendment Rights

An applicant by establishing "probable danger of financial failure" does not thereby gain entitlement to an exemption. The remaining question is whether the application would "effectuate the policy and purpose" of the Act. 15 U.S.C. § 1803(b). The vagueness of the latter phrase would allow the Attorney General unconstitutionally broad discretion to determine the fate of economically troubled newspapers.

The long-standing rule is that discretionary licensing power cannot be delegated to the executive branch in an area pro-

tected by the First Amendment. This Court "has consistently required the statutory delegation to provide narrowly drawn, reasonable and definite standards for the [administering] officials to follow . . .." L. Tribe, *American Constitutional Law* 732-33 (1978).

The respondent Attorney General claims that he exercises "enormously broad" discretion (SER 438), under the "effectuate the policy and purpose" language, in granting or denying newspaper antitrust exemptions. He maintains that Congress has given him uncontrolled discretion to *approve* JOA's, stating (CR 50 at 17, emphasis added):

> [The Attorney General's] determination that approving the proposed JOA would effectuate the policy and purpose of the Act is not judicially reviewable because *it is entirely a matter of discretionary policy and there is 'no law to apply.'*

The Attorney General further claims total discretion to *deny* JOA's (CR 50 at 17, emphasis added):

> Recognizing that situations might occur in which *it is not appropriate to save a failing newspaper*, Congress granted the Attorney General *discretion* to disapprove JOAs which do not effectuate the policy and purpose of the Act.

On appeal, the Attorney General has repeated that "after a newspaper meets the ["failing"] criterion established in the Act by Congress, the Attorney General has *discretion* to determine if approval of an arrangement will fulfill the policy and purpose of the Act," and that the "Attorney General does have authority to deny an application, in his *discretion*, if he believes that approval would not effectuate the policy and purpose of the Act." (AG Reply 10-11, 19 n.11; emphasis added.)

The Attorney General's reading of the statute points up its fatal vagueness. Nothing in the statute requires approval even if the illusory phrase "effectuate the policy and purpose of this chapter" is deemed satisfied.

Similarly overbroad licensing power has been struck down consistently by this Court. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-51 (1969); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 334 U.S. 558, 562 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). The "void for vagueness" rule demands high specificity where the First Amendment is implicated. *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964); *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974); L. Tribe, *American Constitutional Law* 733 (1978).

The Court of Appeals has failed to apply the void-for-vagueness rule for two expressed reasons, both of which are in error. First, the opinion states that "we fail to see any clearly defined first amendment injury." (App. 29a.) That statement is untenable where the executive branch holds the delegated power to determine who may enjoy economic advantages in publishing and who may not. Second, the court asserts that "the Attorney General must base his approval of a proposed JOA on the requirements in the Act as we have interpreted them in this opinion." (App. 30a.) But the opinion deals with the "probable danger of financial failure" part of the two-part test; with regard to the "effectuate the policy and purpose of this chapter" part, it provides no content at all.[18] And the rule in any event is that the content of a speech-affecting statute which is void for vagueness cannot constitutionally be filled in by court decisions. *Smith* v. *Goguen*, *supra*, 415 U.S. 566, 575 (1974). *See also Aptheker* v. *Secretary of State*, 378 U.S. 500, 515-17 (1964).

The part of the statute that is unconstitutional on this basis is 15 U.S.C. § 1803(b), the prospective-licensing provision. The section which rescued then-existing arrangements from the

---

[18] All that the opinion does with regard to the second part of the test is to tell this and future Attorneys General that they should disregard both harmful effects upon other newspapers and unnecessarily anticompetitive features of the proposed arrangement. (App. 25a-28a.)

Supreme Court's 1969 ruling that JOA's constituted *per se* violations of the Sherman Act, § 1803(a), would not be affected.

This Court's long-established rule against vague and discretionary grants of licensing power where the exercise of First Amendment rights may be affected requires that 15 U.S.C. § 1803(b) be held unconstitutional on its face.

CONCLUSION

This case is of exceptional importance to the public and the press. For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: July 18, 1983.

83-107

Office-Supreme Court, U.S.
FILED
JUL 18 1983
ALEXANDER L. STEVAS

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMITTEE FOR AN INDEPENDENT P-I, a corporation; PEOPLE OPPOSED TO A ONE-NEWSPAPER TOWN, an association; COMMITTEE FOR A FREE PRESS, an association; LONGVIEW PUBLISHING COMPANY, a corporation; ROBINSON COMMUNICATIONS, INC., a corporation; VALLEY PUBLISHING COMPANY, a corporation; and NORTHSHORE PUBLISHING COMPANY; a corporation,

Petitioners,

v.

WILLIAM FRENCH SMITH, Attorney General of the United States; THE HEARST CORPORATION, a corporation; and SEATTLE TIMES COMPANY, a corporation,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-3488,
82-3493, and
82-3523

D.C. No. CV 82-730

COMMITTEE FOR AN INDEPENDENT P-I,
PEOPLE OPPOSED TO A ONE-NEWSPAPER TOWN,
COMMITTEE FOR A FREE PRESS,
LONGVIEW PUBLISHING CO., *et al.*,
Plaintiffs-Appellees-Cross-Appellants,

v.

THE HEARST CORP. AND THE
SEATTLE TIMES CO.,
Defendants-Appellants-Cross-Appellees,

and

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL FOR THE UNITED STATES,
Defendant-Appellant-Cross-Appellee.

OPINION

FILED
APR 21 1983
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

Appeal From The United States District Court For The Western District of Washington The Honorable Barbara J. Rothstein, Presiding Argued And Submitted December 17, 1982

Before: ANDERSON, HUG, and POOLE, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

This action presents issues of first impression concerning the scope and operation of the Newspaper Preservation Act. This Act permits competing newspapers that meet certain qualifications to enter into joint arrangements which otherwise would be violative of the antitrust laws. In a memorandum opinion, the district court overturned the Attorney General's action approving a joint operating agreement proposed between the Seattle Post-Intelligencer and the Seattle Times. We reverse and reinstate the Attorney General's decision.

I. BACKGROUND

On March 27, 1981, the Seattle Times Company, owner of the Seattle Times (the "Times"), and The Hearst Corporation, owner of the Seattle Post-Intelligencer (the "P-I"), applied to the United States Attorney General for approval of a joint operating agreement ("JOA") pursuant to the Newspaper Preservation Act (the "Act"), 15 U.S.C. §§ 1801-1804.[1] The

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[1] The Newspaper Preservation Act provides:

§ 1801. Congressional declaration of policy

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

§ 1802. Definitions

As used in this chapter—

(1) The term "antitrust law" means the Federal Trade Commission Act and each statute defined by section 4 thereof as "Antitrust Acts" and all amendments to such Act and such statutes and any other Acts in pari materia.

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or

Times, founded in 1896, and the P-I, founded in 1891, have been the only metropolitan daily newspapers in Seattle for some time. For approximately the last 15 years, the P-I has been losing ground to the Times in terms of circulation and advertising revenue. From 1969 through 1980, the P-I lost over $14 million.

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unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

(3) The term "newspaper owner" mean[s] any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.

(4) The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

(6) The term "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

§ 1803. Antitrust exemptions

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: *Provided*, That the terms of a renewal or amend-

The Newspaper Preservation Act gives the United States Attorney General the authority to approve joint operating agreements between competing newspapers. This approval provides the agreement with a limited antitrust immunity. The Attorney General is required to make two findings as a condition to approving a JOA under the Act: first, one of the newspapers must be "failing," defined as a "publication which, regardless of its ownership or affiliations, is in probable danger of

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ment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

§ 1804. Reinstatement of joint operating arrangements previously adjudged unlawful under antitrust laws

(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under section 1803(a) of this title.

(b) The provisions of section 1803 of this title shall apply to the determination of any civil or criminal action pending in any district court of the United States on July 24, 1970, in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

financial failure," 15 U.S.C. §§ 1802(5), 1803(b); second, the JOA must "effectuate the policy and purpose" of the Act. 15 U.S.C. § 1803(b). Pursuant to Department of Justice regulation, the Attorney General is to refer the JOA application to the Assistant Attorney General in charge of the Antitrust Division. The Assistant Attorney General then recommends either approval of the JOA or that a hearing be held before an administrative law judge ("ALJ"). 28 C.F.R. § 48.7 (1982). If a hearing is held, the Antitrust Division becomes a party to the proceeding, *id.* at § 48.10(b), and other interested parties may intervene, *id.* at § 48.11. The Attorney General must base his decision on the hearing record, the ALJ's recommendation, and any exceptions filed thereto. *Id.* at § 48.13(b).

In this case, the Attorney General followed the Antitrust Division's recommendation to hold a hearing. The Committee and other interested organizations were allowed to intervene. The hearing before Administrative Law Judge Daniel Hanscom lasted through most of November, 1981.

After reviewing the lengthy hearing record, ALJ Hanscom issued his decision recommending approval of the JOA in January of 1982. The ALJ supported his recommendation with 162 findings of fact and several conclusions of law. These findings will be discussed more thoroughly below in the context of the issues to which they pertain. For now, a brief summary will suffice. The ALJ first discussed the dominant position attained by the Times in the Seattle newspaper market. He then described the trend in this country away from competition in many major markets. Newspapers have been folding at an alarming rate; many areas which had two competing newspapers now only have one.

The ALJ then analyzed what he found to be the P-I's poor financial condition. He believed the P-I had been caught in the phenomena that is called the "downward spiral effect," in which a newspaper's declining circulation and lessening advertising revenue feed off one another, eventually forcing it to close. ALJ Hanscom did not find the evidence to support the

allegations that mismanagement of the P-I by the Hearst Corporation (Hearst) had caused the P-I's difficulties. Instead, it was the economics of the newspaper industry, highlighted by the "downward spiral effect," which led to the P-I's failing financial health. Finding the P-I's financial difficulties to be irreversible, the ALJ concluded that Hearst and the Times Company had met their burden of proving the P-I was in a state of "probable financial failure." He therefore recommended approval of the JOA. Importantly, ALJ Hanscom made this recommendation even though he found that, although Hearst had not attempted to sell the P-I and had rebuffed inquiries about a sale, the paper could in all probability be sold to a third party who would continue its independent existence.

The Attorney General followed Judge Hanscom's recommendation in spite of the opposition of the intervenors and the Antitrust Division. Smith adopted all of the ALJ's findings, except for the one stating the P-I could in all probability be sold, which he did not believe to be supported by the evidence. The Attorney General's order approving the agreement was entered on June 15, 1982, and was scheduled to take full effect 10 days later.

The Committee for an Independent P-I ("the Committee" or "plaintiffs"), et al., intervenors below, immediately filed suit against Hearst, the Times Company, and the Attorney General to strike down the approval for the agreement. The district court granted the Committee's motion to stay the effective date of the Attorney General's approval of the JOA. Each side moved for summary judgment. The district court found for defendants on all issues except one. The district court concluded that the Attorney General could not validly approve the JOA when the evidence showed the alternative of a sale to a third party was possible. Judgment for the Committee was entered on August 30, 1982.

Hearst and the Times appeal. The Attorney General filed a separate appeal and the Committee cross-appeals. The three appeals were consolidated and expedited by an order of this court.

II. DISCUSSION

There are four substantive issues presented by this action. First, what role, if any, is proof of interested third-party purchasers to play in the determination that a newspaper is in probable danger of financial failure? Second, must it be shown that the failing newspaper would probably close if the proposed joint operating agreement is not allowed? Third, must the Attorney General determine that the proposed JOA is not unnecessarily competitive and that it would not impair the editorial voices of smaller newspapers in the affected market? Fourth, is the Newspaper Preservation Act unconstitutional under the first amendment?

A. Standard Of Review

Each side agrees that our review of the district court's decision is *de novo*. District court review of agency action is entitled to no particular deference from this court; being limited to the agency record, the district court is in no better position to review agency action than the appellate court. *Asarco, Inc.* v. *U.S. Environmental Protection Agency*, 616 F.2d 1153, 1161 (9th Cir. 1980). The parties dispute, however, the proper standard of review of both the factual and legal determinations of the Attorney General. The dispute, as one might anticipate, involves how much deference the factual and legal findings of the Attorney General deserve.

We do not believe the issue of the standard of review of factual findings to be critical to our decision. The parties debate whether the arbitrary and capricious standard or the substantial evidence standard of review applies. The Attorney General argues that the Administrative Procedure Act's arbitrary and capricious standard governs our review because the Newspaper Preservation Act does not require that a hearing be held. *See* 5 U.S.C. §§ 554, 556, 706(2)(E); 28 C.F.R. § 48.8(c). The Committee asserts that, nevertheless, a hearing *was held* and the regulations require that all hearings be conducted pursuant to 5 U.S.C. § 556 of the APA. 28 C.F.R. § 48.10(4). In turn, the APA's substantial evidence standard

applies to all "case[s] subject to section . . . 556." 5 U.S.C § 706(2)(E). The Second and Seventh Circuits have held that, in the area of administrative rulemaking, the arbitrary and capricious standard of review applies when the agency conducts a hearing by virtue of its regulations rather than required by statute. *Automobile Club of New York, Inc.* v. *Cox*, 592 F.2d 658, 664 (2d Cir. 1979); *Amusement & Music Operators Ass'n* v. *Copyright Royalty Tribunal*, 676 F.2d 1144, 1149-1152 (7th Cir. 1982). However, we find it unnecessary to resolve this issue, as our analysis will indicate.

Review under either standard is narrowly prescribed. We do not need to decide this issue, however, because our review of the record as a whole persuades us the Attorney General's decision is supported by substantial evidence, i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477, 95 L.Ed. 456, 462 (1951). Since we find that the Attorney General's decision was supported by substantial evidence, which allows broader appellate review than the arbitrary and capricious test, there is no question that the Attorney General did not act in an arbitrary and capricious fashion. K. Davis, *Administrative Law Treatise*, § 29.00 at 519 (1982 Supp.); *see Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 143, 18 L.Ed.2d 681, 688 (1967).

The standard of review of legal issues presents somewhat more difficult questions. The APA mandates that the reviewing court "decide all relevant questions of law [and] interpret constitutional and statutory provisions. . . ." 5 U.S.C. § 706. Conceding this to be the general rule, the Attorney General argues that the courts must nonetheless grant great deference to the interpretation of a statute by the agency charged with its administration. *Udall* v. *Tallman*, 380 U.S. 1, 16, 13 L.Ed.2d 616, 625 (1965). We agree. The Committee correctly points out that there has not been a long-standing interpretation of the Newspaper Preservation Act. But a long-term interpretation is not a necessary precondition to our deferring to an agency's construction of a statute. *Columbia Basin Land Protection*

Ass'n v. *Schlesinger*, 643 F.2d 585, 600 (9th Cir. 1981). Also, the assertion that we should not defer to the Attorney General's interpretation of the Act because, in the Committee's view, he lacks substantial expertise in the antitrust field is without merit.[2] *Doyon, Ltd.* v. *Bristol Bay Native Corp.*, 569 F.2d 491, 497 (9th Cir.), *cert. denied*, 439 U.S. 954, 58 L.Ed.2d 345 (1978).

Assuredly, our deference to the views of the Attorney General is tempered by the factors noted above. We do not imply that deference to an agency's interpretation of the law equates with blind faith. A court is obliged to accept the administrative construction of a statute only so far as it is reasonable, *Columbia Basin*, 643 F.2d at 600, and consistent with the intent of Congress in adopting the statute. *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95, 38 L.Ed. 287, 295 (1973). Our review of the Newspaper Preservation Act and its interpretation by the Attorney General is guided by an additional rule developed out of the court's recognition of the fundamental importance of the antitrust laws — exemptions to the antitrust laws are to be narrowly construed. *See, e.g., Group Life and Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231, 59 L.Ed.2d 261, 280 (1979).

B. Background Of The Newspaper Preservation Act

The Newspaper Preservation Act was passed in July of 1970 as Public Law No. 91-353. An understanding of the circumstances leading to its passage provides substantial insight into

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[2] The Committee also argues that we should not defer to the Attorney General's interpretation of the Newspaper Preservation Act when there has been a prior interpretation inconsistent with his present view of the Act. *See United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396, 100 L.Ed. 441, 451 (1956); *Power Brake Company* v. *United States*, 427 F.2d 163, 164 (9th Cir. 1970). We agree with that proposition but, as will be discussed below, we do not believe the prior interpretation is substantially different from what Attorney General Smith presently believes to be a proper interpretation of the Act.

the intent of the Act. What follows is distillation of its history, taken primarily from the House and Senate Reports. S. Rep. No. 535, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 1193, 91st Cong., 2nd Sess., *reprinted in* 1970 U.S. Code. Cong. & Ad. News 3547.

In 1964, the Department of Justice began investigating joint newspaper operating arrangements. At that time, approximately 22 JOA's were in force, some dating from the 1930's. The investigation resulted in an antitrust action being filed against one such arrangement in Tucson, Arizona. The district court held the arrangement to be a violation of § 1 of the Sherman Act (price fixing, profit pooling and market allocation), § 2 of the Sherman Act (monopolization), and § 7 of the Clayton Act (illegal merger.) *United States* v. *Citizen Publishing Co.*, 280 F.Supp. 978 (D. Ariz. 1968).

Soon after the Citizen Publishing case was filed, a number of bills were introduced in Congress to exempt then-existing JOA's from the antitrust laws. The foremost of these was S. 1312, the Failing Newspaper Act, introduced in March, 1967, by Senator Hayden and 14 cosponsors. A similar bill, H.R. 7446, was introduced in the House by Representative Matsunaga.

In 1968, the Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary held 21 days of hearings on S. 1312. The Subcommittee reported the bill favorably with amendments. Due to time constraints, the bill was never acted upon by the 90th Congress. The House also held hearings on its version of the bill, but did not act upon it.

In January of 1969, Representative Matsunaga and 108 cosponsors introduced another bill, H.R. 279, now called the Newspaper Preservation Act. In March of 1969, the Supreme Court affirmed the district court in *Citizen Publishing*, 394 U.S. 131, 22 L.Ed.2d 148 (1969). Within two weeks, Senator Inouye introduced S. 1520 on behalf of 33 cosponsors. Three more days of hearings were held in the Senate in June of 1969. The House held hearings in September and October of 1969.

Both the Senate and House Committees reported the bills favorably with amendments.

The House and Senate versions of the bill were similar in many respects. The reports emphatically state that the primary intent of the bills was to reverse the result of the Supreme Court's holding in *Citizen Publishing*, which strictly applied the "failing company" doctrine to newspaper JOA's. This doctrine provides a defense to otherwise illegal mergers and agreements when it is shown that one of the businesses is a "failing company," which means it is on the brink of collapse, its prospects for reorganization are dim or nonexistent, and no other noncompeting buyers are available. 394 U.S. 137-138, 22 L.Ed. 155-156. The Court, in other words, applied the failing company defense quite narrowly; the JOA had to be, in the words of Justice Douglas' opinion, "the last straw." *Id.* Citizen Publishing did not prove it was in such dire financial straits and the JOA was held to be a clear violation of the antitrust laws. Congress attempted to reverse the result of *Citizen Publishing* by allowing newspapers to enter into a JOA prior to the time the financially troubled newspaper is on its deathbed. As stated by Senator Bennett: "The Court failed to articulate a doctrine which recognized the fundamental importance of placing a failing newspaper on a sound financial basis in order to preserve these two voices before there is a grave possibility of failure." 116 Cong. Rec. 1786 (1970).

Both the House and the Senate believed that authorizing certain joint action between newspapers would serve the best interest of the people of the United States and the first amendment. This interest is served by preserving the independent editorial voice of the newspaper in financial distress. Unique economic forces were considered to be at work in the newspaper industry. These forces necessitated allowing newspapers to enter joint agreements before they reached the point of distress required by *Citizen Publishing*. The permissible scope of a JOA is limited, however. Although the House and Senate bills allow the competing newspapers to share the business aspects of newspaper publication (printing, circula-

tion, production facilities, advertising, revenue), the editorial and reportorial functions of the two newspapers must remain separate. *See* 15 U.S.C. § 1802(2).

The two bills diverged in an area that is of critical importance here. This divergence involves the question of the extent of Congress' repudiation of *Citizen Publishing*'s failing company standard. Originally, the Senate bill defined a "failing newspaper" simply as one "not likely to remain or become financially sound." This standard was applicable to both existing JOA's and those to be entered in the future. Later, the Senate added the test that the paper be either not "financially sound" or in "probable danger of failure." See S. Rep. No. 535 at 1-2. The House considered this disjunctive definition too loosely drawn for prospective JOA's. Instead, for the purposes of future JOA's, a failing newspaper was defined as one in "probable danger of financial failure." This was the standard that was enacted into law. *See* 15 U.S.C. § 1802(5). The Newspaper Preservation Act, modeled largely on H.R. 279, easily passed both houses in July of 1970.

This brief background of the Act provides a starting point for determining whether the Attorney General acted properly by approving the JOA at issue here. More legislative history will be discussed below, but at this point it is evident that the standard "in probable danger of financial failure" falls somewhere in between the failing company standards of *Citizen Publishing* and the "not likely to remain or become financially sound" definition used in the rejected Senate version of the Act.

C. The Prospective Buyers Issue

The rejected standard of *Citizen Publishing* contained an element that required the failing company to show no prospective purchasers were available. 394 U.S. at 137, 22 L.Ed.2d at 155. This required not only that the failing company accept and act on offers to purchase, but also that it make affirmative attempts to sell. 394 U.S. at 137, 22 L.Ed. at 156. In this context, the district court found the Attorney General had

acted improperly for two reasons: first, he incorrectly rejected the ALJ's proposed Finding of Fact 158, which stated in essence that the P-I could in all probability be sold at fair market value to a third party who would continue to operate it;[3] second, the Attorney General failed to construe the Act to require that non-anticompetitive alternatives to a JOA be explored. The facts showed the existence of interested and able purchasers, but Hearst never pursued that course. The Committee, of course, agrees with the district court. The Attorney General and Hearst believe the court erred both on the factual issue regarding the existence of ready, willing and able buyers and on the legal standard utilized. We agree with the district court to the extent it held that alternatives to a JOA are relevant to the determination that a newspaper qualifies under the Act. We find, however, that Hearst met its burden of showing that the alleged alternatives did not offer a solution to the P-I's difficulties.

We do not find the dispute concerning Finding of Fact 158 crucial to our resolution of the buyer issue. On the one hand, we agree with the Attorney General's argument that the evidence did not require him to adopt Finding of Fact 158.[4] While the evidence showed that six individuals or entities inquired into

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[3] Finding of Fact 158 provides:

> Considering that the Post-Intelligencer is not, and has not been for sale, and that all inquiries regarding possible purchase have been rebuffed by The Hearst Corporation with statements to that effect, and that responsible prospective purchasers nevertheless continue to appear and express an interest in buying the Post-Intelligencer, it must be concluded that the Post-Intelligencer could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily.

[4] We must emphasize that in this situation our review is of the Attorney General's decision, not the ALJ's. When the agency disagrees with the ALJ, deference still runs in favor of the agency; the ALJ's contrary findings will simply be weighed along with the other evidence opposing the agency's decision. *See, e.g., NLRB v. Brooks Camera, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982).

the possible sale of the P-I, it did not show that the P-I could in all probability be sold to a buyer who would continue its operation as an independent newspaper. The "inquiries" were just that: they were not offers.[5] We recognize that Hearst responded to most of these inquiries with the simple statement that the "P-I was not for sale." Hearst's failure to offer the paper for sale and to favorably respond to such inquiries does not, how-

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[5] There was evidence of seven purchase inquiries. Apparently, all the inquiries were by individuals or groups who had the potential means to back up any offers they might have made. Briefly, the nature of these inquiries and Hearst's response were as follows:

(1) In 1975, a Mr. Bailey asked the P-I's Seattle attorney what the asking price of the P-I was. The P-I privately advised Mr. Bailey that the paper was not for sale.

(2) In 1976, Mr. Eller made a similar inquiry and received a similar response.

(3) Mr. Cunningham made an inquiry in 1977. He was also told the paper was not for sale.

(4) In 1978, Mr. Guzzo, on behalf of another party, asked Hearst whether the paper was for sale. Hearst replied it was not.

(5) In May of 1981, after the proposed JOA was announced, Mr. Cunningham made another inquiry. While Hearst replied it had no present intention of selling, it did state it would carefully consider any responsible bona fide offer. No offer was ever submitted.

(6) In October of 1981, Rupert Murdoch stated that if the JOA failed to go through, he would like to be considered as a buyer.

(7) On November 24, 1981, a Mr. Snellman made it known that he was interested in buying the P-I at a price to be set by an appraiser. This inquiry was made on the last day testimony was to be taken at the hearing and after the close of the intervenor's case. The closing date for the hearing was set for November 28. The ALJ allowed the letter indicating Mr. Snellman's interest into evidence but, due to the last minute nature of the offer and time constraints, did not allow Mr. Snellman to testify. Apparently, Hearst never responded to this late inquiry.

Findings of Fact 156 and 157.

ever, compel the conclusion made by the ALJ in Finding of Fact 158.[8]

Our affirmance of the Attorney General on the Finding of Fact 158 issue does not, as he and Hearst seem to argue, end our analysis. The facts are undisputed that purchase inquiries did occur and that Hearst did not cultivate these inquiries. See Findings of Fact 156 and 157. A close reading of the district court's decision shows that it was premised on these underlying facts and not simply on Finding of Fact 158. While we disagree with the district court's conclusion that an attempt to sell the paper is necessary to prove no reasonable alternatives to the JOA exist, we do agree that reasonable alternatives to a JOA are relevant to our analysis.

The starting point for our analysis must begin with the Congressional intent to repudiate *Citizen Publishing's* application of the failing company defense. We believe that Congress intended a total rejection of the failing company defense as used in *Citizen Publishing*, including the requirement that the applicant attempt to sell the newspaper. *See, e.g.*, S. Rep. No. 535, *supra*, at 4; H. Rep., *supra*, 1970 U.S. Code Cong. & Ad. News at 3547, 3555; Remarks of Sen. Inouye, 116 Cong. Rec. 1785; Remarks of Sen. Bennett, *Id.* at 1786-1787; Remarks of Rep. Railsback, *Id.* at 23,154. The Federal Trade Commission opposed the Act because, among other reasons, it did not require the "search for an available purchaser." S. Rep. No. 535, *supra*, at 10. Holding that there is no per se sale requirement does not mean, however, that proof of interested purchasers is irrelevant.

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[8] Our review on this point is narrow: Was it proper to reject Finding of Fact 158? We will discuss in more detail below the ramifications of Hearst's failure to hold the paper up for sale and its rebuff of potential buyers. For now, we should note that the requirement of attempting to sell the financially distressed company was one of the *Citizen Publishing* requirements rejected by the Newspaper Preservation Act.

The district court agreed that Hearst need not have attempted to sell the paper. But the court held that without such an attempt, Hearst had failed to carry its burden of proving that no reasonable alternatives to the JOA were available. The court's determination that reasonable alternatives must be explored was based on the recommended decision of Administrative Law Judge Donald Moore in a prior application under the Newspaper Preservation Act involving the Cincinnati Post. *Recommended Decision of Administrative Law Judge Moore on the Application of the Cincinnati Enquirer and the E. W. Scripps Co.*, Department of Justice Docket No. 43-03-24-4 (1979). ALJ Moore recognized that the significance of evidence of prospective buyers was not clearly set forth in the Act's legislative history. *Recommended Decision of ALJ Moore* at 120. He believed, however, that Congress did intend the "probable danger of financial failure standard" to be interpreted with reference to the Bank Merger Act and the gloss put upon it by the Supreme Court in *United States* v. *Third National Bank*, 390 U.S. 171, 19 L.Ed.2d 1015 (1967). *Id.* at 121. Judge Moore correctly pointed out that the Senate Report refers to the Bank Merger Act and *Third National Bank* for guidance in interpreting the probable danger of financial failure standard, S. Rep. No. 535, *supra*, at 2, as did Representative Kastenmeier, the floor leader, during the debates on the House bill, 116 Cong. Rec. 23,146.[7] *Id.* at 121-122. Judge Moore recognized that the actual standards used to judge the permissibility of bank mergers are quite different than the standards

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[7] In reference to the amendment which disjunctively added the danger of probable failure standard to the unlikely to remain financially sound definition of a failing paper, the report states: "This phrase is taken from the Bank Merger Act and has been the subject of a Supreme Court opinion in *U.S.* v. *Third National Bank*."

Rep. Kastenmeier, in response to the objection that the probable danger standard was loosely drawn, stated: "The term . . . is one that has a legislative history. It comes out of the Bank Merger Act. It is understood by the courts in the field, and happens to be a term that is well known."

for newspaper JOA's. *See* 12 U.S.C. § 1828(c)(5). He believed it was reasonable, however, to conclude that Congress intended the Supreme Court's interpretation of the Bank Merger Act in *Third National Bank* to be applicable to newspaper JOA's. *Id.* at 122-123. We agree.

The Bank Merger Act creates an antitrust exemption for certain bank mergers. The Act utilizes a balancing test, weighing the anticompetitive effects of the proposed merger against the public interest. 12 U.S.C. § 1828(c)(5). In *Third National Bank*, the Court interpreted this balancing test to require the proponents of the merger to "reliably establish the unavailability of alternative solutions." 390 U.S. at 190, 19 L.Ed.2d at 1029. Where it had been shown that managerial deficiencies were the crux of the bank's financial difficulties, the possibility of a sale or the infusion of new management must be considered. 390 U.S. at 190-191, 19 L.Ed. at 1029-1030.

Based on *Third National Bank*, ALJ Moore fashioned the following test to judge whether a newspaper qualifies as failing under the Act:

> Accordingly, an applicant which has not sought or considered a noncompeting buyer must establish that it would be futile to require attempts to sell, either because of an unavailability of qualified purchasers or because it is unlikely that the paper's condition would be materially improved by the infusion of new ownership and new management.

Recommended Decision of ALJ Moore at 127.

Both the Attorney General and Hearst argue against Judge Moore's analysis. Specifically, they maintain that the Act utilizes a purely intrinsic economic test; alternatives in general and the presence of interested purchasers in particular are relevant, if at all, only to the extent they establish the newspaper operation is not probably failing. They contend primarily that ALJ Moore's analysis need not be considered because it was not expressly adopted by then Attorney General Civiletti. It is true that the Civiletti decision adopted only those conclusions of law necessary to the determination that the Cincin-

nati Post was a failing newspaper. Just what portions of Judge Moore's recommendations were necessary to his approval of the JOA is not easily answered. Nonetheless, Judge Moore presents a reasonable construction of the somewhat nebulous statements in the legislative history. While we do not adopt in whole the test he utilized, we nevertheless find that his analysis of the failing newspaper standard provides a sound foundation for our interpretation of the Act. And, as will be discussed below, our interpretation is not much different, if at all, than that proffered by the Attorney General.

As noted earlier in the discussion of the background of the Newspaper Preservation Act, the House modified the proposed Senate definition of a failing newspaper applicable to future JOA's. The probable danger standard was intended to be "far more stringent" than the financially sound standard. Statement of Rep. Kastenmeier, 116 Cong. Rec. 23,146. Representative McCulloch, a cosponsor of the House bill, stated that the antitrust exemption for future JOA's is "carefully circumscribed. . . . [It] should be limited only to those situations where a joint newspaper operating arrangement is demonstrably essential to prevent a newspaper failure. . . ." *Id.* at 23,148. Requiring the Attorney General to consider alternatives to the JOA effectuates the intent of Congress to create a tougher standard. We also find support for that analysis in the statements of the sponsors of the Act who described the factors one should analyze to determine if a newspaper meets the financially sound standard. These statements strongly imply that this standard was to be based solely on economic considerations. *See, e.g.*, Remarks of Sen. Bennett, *Id.* at 1787; Remarks of Rep. Lloyd, *Id.* at 23,155; S. Rep. No. 535, *supra*, at 5. Hearst and the Attorney General nonetheless contend that this stricter test is still a purely economic standard; Congress intended only to require an applicant to make a stronger showing of the likelihood of failure. We disagree with that argument only to the extent that it rejects the consideration of economic factors which are arguably extrinsic to the newspa-

per operation.* We base our disagreement with this argument not only on the legislative history and our evaluation of the reasonableness of the foregoing analysis, but also on the well-recognized rule that antitrust exemptions must be narrowly construed. *Group Life & Health Ins. Co.* v. *Royal Drug*, 440 U.S. at 231, 59 L.Ed.2d at 280 (1979).

The Act should receive a commonsense construction. The probable danger standard is, by the plain meaning of its words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed? The existence of interested buyers may be relevant to this determination. Also, poor management practices such as concerned the Supreme Court in *Third National Bank* may show that, with managerial improvement, the paper's economic problems can be overcome. We noted earlier in this discussion that the Attorney General and Hearst conceded that interested purchasers *may* be relevant to the determination a newspaper is failing. In particular, the Attorney General does not argue strongly against either ALJ Moore's or the district court's analysis. Significantly, the Attorney General's order approving the JOA application stated that "evidence of purchaser offers or negotiations may be pertinent in assessing the financial conditions and prospects of the allegedly failing newspaper." Attorney General's Order No. 979-82 at 11. The pertinence of interested purchasers, as the Attorney General apparently concedes, may require a JOA applicant to prove

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* There are few, if any, things that affect a business's success which can truly be characterized as noneconomic. A good example is the political viewpoint of a publisher. That viewpoint certainly shows up in the editorial policies of a newspaper. Those policies in turn may either attract or reduce readership. We do not wish to imply that a newspaper must explore the alternative of changing its editorial policies prior to entering a JOA. The Attorney General and Hearst tend to argue that any factors extrinsic to the newspaper operation are "noneconomic." That, however, is a shortsighted view, and we reject it so far as it leads to the conclusion that proof of interested purchasers is "noneconomic" and therefore irrelevant under the Act.

that the "new ownership and management could not convert the [paper] into a profitable enterprise without resort to a joint operating arrangement." *Recommended Decision of ALJ Moore* at 127; *see Third National Bank*, 390 U.S. at 189, 19 L.Ed.2d at 1029. This interpretation of the Act is not burdensome. Its primary effect is to prevent newspapers from allowing or encouraging financial difficulties in the hope of reaping long-term financial gains through a JOA. A JOA applicant should not be allowed to engage in poor business practices or maintain inept personnel in anticipation that it may later qualify for an antitrust exemption in the future. *See* S. Rep. No. 535, *supra*, at 5; Remarks of Sen. Bennett, 116 Cong. Rec. 1788. In this respect, "alternatives" to a JOA are relevant to both the causes of a newspaper's financial decline and its future prospects.

Our discussion is in substantial agreement with the district court's opinion. We do not agree, however, that the facts are insufficient to support the Attorney General's order. The critical question is whether it was shown that the P-I's financial condition was such that new management might be successful in reversing the P-I's difficulties. There is sufficient evidence in the record supporting a negative answer.

ALJ Hanscom made detailed findings on the condition of the P-I and the Seattle newspaper market. He found the P-I had lost over $14,000,000 since 1969, Finding of Fact 59, and that the P-I was in a "downward spiral," *see* Finding of Fact 130. The ALJ also rejected the argument that Hearst had mismanaged the P-I. Instead, he found the P-I management had acted competently and reasonably in an effort to return the newspaper to profitability. Finding of Fact 94. Judge Hanscom also explored numerous positive prospects and possible remedial measures proposed by the intervenors in their effort to show the P-I can be returned to profitability. He rejected them as being "ungrounded in reality." Finding of Fact 146; *see also* Findings of Fact 137-155. Based on these findings, we believe

there is ample support in the record for the Attorney General's adoption of Finding of Fact 109, which stated:

> Although some of the witnesses in this proceeding were critical of the handling of the Post-Intelligencer, the evidence does not establish that new management would be any more successful than Hearst and current management of the Post-Intelligencer in returning it to profitability.

Despite Finding of Fact 109, the district court held that Hearst had not sustained its burden of proving new management could not succeed in turning the P-I around, apparently because Hearst did not respond favorably to purchase inquiries. In light of the existence of substantial evidence in support of Finding of Fact 109, this was in error. In the absence of a showing that there is a likelihood new management would succeed, Hearst's failure to consider purchase inquiries lost importance. We therefore reverse the district court's holding.

Also, the district court misperceives the proper scope of the burden of proof under the Act. It is true that the ultimate burden of persuasion lies with the proponents of the JOA. 28 C.F.R. § 48.10(4) (1982). Generally, however, that burden only entails a showing of (1) the economic fact of probable failure (downward spiral, irreversible losses), and (2) reasonable management practices. In an adversarial situation such as here, parties opposed to the JOA may rebut this evidence by showing the paper's losses did not in fact exist or were due to unreasonable management practices.[9] The opponents also might offer, as they did here, proof of parties interested in

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[9] We note that the Antitrust Division will always be a party when a hearing is held. Other interested parties may intervene. 28 C.F.R. § 48.10(b). Also important is the requirement that the applicants for a JOA must provide substantial financial documentation concerning their newspapers to the Attorney General. 28 C.F.R. § 48.4. This information is generally open to public view and could be used to rebut an applicant's evidence. In fact, the intervenors did rely on that information in attacking the proposed JOA. Also, interested buyers could have used this information to come up with a reasonable plan to return the paper to profitability.

purchasing the newspaper. This evidence might show the paper is not actually in probable danger of failure because reasonable changes can return the paper to profitability.[10] When the proponents of the JOA established, as they did here, that the paper was managed reasonably and its trend toward failure is irreversible *under any management*, we have no difficulty concluding that the burden of proof has been met. *Cf. Third National Bank*, 390 U.S. at 189, 19 L.Ed.2d at 1029 (where proof adduced at trial showed "failing" bank's problems were due to mismanagement, bank had burden of showing reasonable attempts to solve management difficulties were made, or that they would be unlikely to succeed).

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[10] The Committee argues that because parties are interested in purchasing the P-I, it cannot actually be failing. Various bits of legislative history are cited in support of this contention. We disagree, however, with this argument which, in effect, states that a newspaper that meets the definition of failing under the Act cannot be sold. The statements of various congressmen more closely relate to the belief that once a newspaper reaches the point of financial difficulty required by *Citizen Publishing*, the paper may very well have little value as an acquisition or as a party in a proposed JOA; it may very well be more advantageous for the dominant paper to let the ailing paper die and enjoy the benefits of a natural monopoly rather than entering a joint agreement. *See, e.g.*, House of Representatives Hearings before the Antitrust Subcommittee on H.R. 279, 91st Cong., 1st Sess. 12 (1969); *S. Rep.* No. 535, *supra*, at 4; Remarks of Sen. Inouye, 116 Cong. Rec. 1786, Remarks of Rep. Annunzio, *Id.* at 23,168; *cf.* Remarks of Rep. Feighan, *Id.* at 23,156 (objects to the Act for the reason it will allow a paper to be considered failing even though it could be sold).

Also, on December 15, 1982, the Committee requested this court to take judicial notice of the sale of a Hearst newspaper, the Boston Herald-American, allegedly in "probable danger of failure," to the News America Publishing Company. We deny this request. Based on our interpretation of the Act, this sale is not relevant to the determination that the Post-Intelligencer is in probable danger of financial failure.

D. Proof Of Probable Closure

As an alternative ground for overturning the approval of the Post-Intelligencer/Times joint operating agreement, the Committee contends that the Attorney General failed to interpret the Act to require proof the P-I would be closed if the JOA application were disapproved. The district court held for defendants on this issue. It found it sufficient the Attorney General concluded that, but for the ownership of Hearst, the P-I would probably be closed. We agree.

For purposes of this issue, we accept the Committee's assertion that Hearst never considered closing the P-I, even should the joint operating agreement not be allowed. Our focus, however, is on other language in the failing newspaper definition not yet discussed. A newspaper is defined as failing if it is in probable danger of financial failure "regardless of its ownership or affiliations." 15 U.S.C. § 1802(5). This language supports the ALJ's and the Attorney General's conclusion that the financial strength of Hearst need not be considered in determining whether the P-I is failing. We therefore agree with the district court's resolution of this issue: substantial evidence establishes that the P-I is in dire financial trouble and, without the backing of Hearst, it would probably close.

We do not dispute the Committee's assertions that a primary intent of the Newspaper Preservation Act was to promote the diversity of editorial voices among newspapers. Congress was of the opinion that unique economic forces operate in the newspaper industry, forces which caused the decline and closure of numerous newspapers since the turn of the century. S. Rep. No. 535, *supra* at 2-3; H. Rep. No. 1193, *supra*, at 3548-3549. In order to maintain editorial diversity, it is beyond question that the purpose of the Act is to prevent the *closure* of the ailing newspaper. *See, e.g.*, Remarks of Sen. Goldwater, 116 Cong. Rec. 1795; Remarks of Sen. Ellender, *Id.* at 1785; Remarks of Sen. Inouye, *Id.* at 1786; Remarks of Rep. Matsunga, *Id.* at 23,153; Remarks of Rep. McCulloch, *Id.* at 23,148. We note, however, that Congress was just as concerned with the

loss of an independent editorial voice through a merger, as with an actual closure of a newspaper. Remarks of Rep. Matsunaga, *supra*.

We do not accept Hearst's argument that requiring proof of probable closure is the same as requiring the paper be on the brink of collapse, an element of the "failing company" defense which was clearly repudiated by the Newspaper Preservation Act. We adhere to our belief that Congress intended the phrase "probable danger of failure" to mean a probability that the paper would be closed and an editorial voice lost. We do not agree, however, with the Committee's assertion that proof of probable closure is a per se rule applicable to all JOA applications. Our conclusion that Congress intended that there be a showing the newspaper will likely close must be interpreted in light of the language that a newspaper's failing status should be determined without regard to its ownership or affiliations.

We believe that the intent of the "regardless of ownership" language is quite clear. It means simply that the ailing newspaper should be analyzed as a free-standing entity, as if it were not owned by a corporate parent. The legislative history does not contradict the plain meaning of this language. The Senate Report concisely describes the purpose of this language:

> The phrase "regardless of its ownership or affiliations" was included to focus the attention of the court on the business entity before it rather than the related business enterprises. Whether a newspaper is failing should be determined on the basis of the operation in the particular city rather than on the basis of the sweep of the newspaper owner's business interests. However, the phrase shall not preclude court examination of transactions between the newspaper seeking exemption and related companies which supply goods and services or which are customers. If such examination were precluded, it would make it possible to create [a] "failing newspaper" by artificial bookkeeping entries and that is not intended.

S. Rep. No. 535, *supra*, at 5. Similarly, Senator Hruska stated the purpose of this language was to insure that judicial interpretation on the question whether a paper is failing be

"based upon the financial operations of that paper, and not upon the presence or absence of financial support from other newspaper business activities in other cities or from other financial activities of the owners of the failing newspaper." 116 Cong. Rec. 2006; *see also* Remarks of Reps. Eckhardt and Kastenmeier, *Id.* at 23,147; *cf.* Letter from Paul Rand Dixon to Sen. James Eastland (July 25, 1969), *attached to* S. Rep. No. 535, *supra*, at 9-11 (Mr. Dixon, then the Chairman of the Federal Trade Commission, objected to the passage of the Act because, among other reasons, "[e]very failing newspaper may enter a joint operating arrangement without reference to the identity or financial resources of its owner or owners.")

We find that the above-quoted portion of the Senate Report sums up the importance of the phrase "regardless of ownership or affiliations" quite well: generally, ownership is not to be a factor in considering whether a newspaper is failing; an exception to the general rule is that ownership may be analyzed to ensure the owner has not created a failing company through creative bookkeeping. The Committee apparently does not dispute that the P-I as a separate entity is in financial trouble. It instead asserts that, based on an "incremental analysis," Hearst is receiving net benefits from the P-I's financial problems for tax and other reasons. As the Attorney General held, these arguable benefits to Hearst do not counter that the P-I, as a separate entity, is in severe financial trouble and would likely close if not owned by Hearst. We affirm the district court on this issue.

E. Harm To Competing Newspapers

The Committee also argues that the order approving the JOA must be overturned because the Attorney General did not consider the potential injury to other newspapers in the market and did not limit the terms of the JOA to the least anticompetitive approach possible. The argument is that these conditions are implied in the requirement that the Attorney General find that the JOA "effectuate[s] the policy and purpose of the Act." The district court held against the Committee on this issue. For the following reasons, we affirm.

The policy of the Act is stated in its first section. That policy is to maintain editorial and reportorial independence among newspapers through the preservation of newspaper publication in areas "where a joint operating agreement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter." 15 U.S.C. § 1801. This declaration and the legislative history compel the conclusion that the Act itself is a policy determination that the preservation of editorial diversity through joint operating agreements outweighs any potentially anticompetitive effects this antitrust exemption might cause. Congress struck the balance in favor of the Act notwithstanding opposition that decried the potential harm to smaller, usually suburban newspapers competing in the market area. As stated in the House Report: "Although commercial competition may have been affected to some extent by these arrangements, they have achieved the more important objective of preserving separate editorial voices." H. Rep. No. 1193, *supra*, at 3549. Representatives MacGregor and Mikva objected to the Act because "[i]t will preserve certain newspapers but will stifle competition in ideas by crippling the growth of small newspapers and preventing successful establishment of competing dailies." *Id.* at 3558; *see also* Remarks of Rep. MacGregor, 116 Cong. Rec. 23,149-50; Remarks of Sen. McIntyre, *Id.* at 1815-1817.

The Act itself contains an important safeguard which prevents the parties to a JOA from engaging in any conduct which would violate the antitrust laws if done by a single entity. 15 U.S.C. § 1803(c). As explained in the Senate Report, this section is designed "to protect the competitive position of newspapers which share the market with a joint operating arrangement." S. Rep. No. 535, *supra*, at 5. It can easily be garnered from this and the other language cited above that Congress considered the question of harm to other newspapers and resolved it in favor of the antitrust exemption.[11]

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[11] The Committee's only support for its position is a statement by Senator Dirksen during the Senate hearings. Senator Dirksen's

We reject the argument that the terms of the proposed JOA do not effectuate the policy and purpose of the Act.[12] Title 15 U.S.C. § 1802(2) discloses the proper subjects of a newspaper joint operating agreement. Joint action with respect to the following is allowed: sharing printing and production facilities; joint business, advertising and circulation departments; the setting of circulation and advertising rates; and revenue distribution. The express limit on this joint activity is that editorial and reportorial functions must remain separate and independent. The Attorney General found and the Committee does not seriously dispute that the proposed JOA meets these restrictions. It is evident that Congress determined what it considered to be the permissible scope of a newspaper JOA. Again, opponents of the Act argued against it because they felt it was an unnecessary and broad exemption from the antitrust laws. See S. Rep. No. 535, *supra*, at 7 and 10 for the FTC's objections that the Act placed no time limits on potential JOA's. Representatives MacGregor and Mikva voiced a similar objection. H. Rep. No. 1193, *supra*, at 3557.

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amendment added the requirement of Attorney General approval for prospective JOA's. He explained: "In this way, the interest of the suburban papers and the unions will be considered by the Justice Department before any new arrangements are authorized." Senate Hearings before the Antitrust and Monopoly Subcommittee on S. 1520, 91st Cong., 1st Sess. 5 (1969). Senator Dirksen later explained his intent in proposing this amendment: "Before authorizing such arrangements in the future, the Department could hear from other interested parties—competing papers, unions, etc.—as well as make its own investigation, in order to be certain the new arrangement is essential and justified." *Id.* at 9. Although Senator Dirksen's statements do not refer to the requirement that the JOA "effectuate the policy and purpose of the Act," it is evident he intended primarily to allow interested parties a chance to voice their views. The regulations adopted by the Attorney General permit this and that is what in fact happened in the proceedings below.

[12] The Committee's primary objection is that the agreement is too long (50 years) and that it will not cease to exist even if the P-I becomes profitable in the future.

We conclude that the district court correctly rejected the Committee's claims on this issue. Congress recognized that the approval of a JOA may have anticompetitive ramifications. This was a national policy choice Congress was free to make. It believed those possibly harmful effects were outweighed by other considerations and sufficiently alleviated by the requirements of the Act. The JOA is not inconsistent with the Act.

F. First Amendment Issues

The Committee also argues the Newspaper Preservation Act as a whole is invalid by virtue of the first amendment. The challenge is two-pronged: first, that the Act is invalid as applied because approval of the JOA would impair the first amendment rights of smaller newspapers in the market; second, that the Act is invalid on its face as an overbroad and vague delegation of power in an area affecting first amendment rights. Although these arguments are imaginative, they lack substantial merit.

The district court rejected the claim that the Act is unconstitutional as applied, basing its decision largely on two district court decisions dealing with the same argument. *Bay Guardian* v. *Chronicle Publishing Co.*, 344 F.Supp. 1155 (N.D. Cal. 1972); *City and County of Honolulu* v. *Hawaii Newspaper Agency, Inc.*, 7 Media L. Rep. (BNA) 2495 (D. Hawaii 1981). We agree with the district court's rejection of the Committee's assertion that these cases are distinguishable because the plaintiffs there were challenging preexisting joint operating agreements. In either situation, the courts are faced with the claim that this antitrust exemption may cause economic injury to smaller newspapers, which might lessen circulation, which in turn affects the "breadth" of one's freedom of press.

It is obvious that the Newspaper Preservation Act's antitrust exemption will not affect the *content* of speech of these smaller newspapers. The Act is an economic regulation which has the intent of promoting and aiding the press. At most, the Act *may* affect the number of "readers" a newspaper has. But that the Act may have such an effect is no different, in our

view, than any other economic regulation of the newspaper industry. *Associated Press* v. *NLRB*, 301 U.S. 103, 132-133, 81 L.Ed. 392 (1937); *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184, 90 L.Ed. 607, 613 (1946); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 193-194, 90 L.Ed. 614, 620-621 (1946).

Grosjean v. *American Press Co.*, 297 U.S. 233, 80 L.Ed. 660 (1935), is cited by the Committee in support of its first amendment argument. In *Grosjean*, the Supreme Court struck down a statute which imposed a special tax on newspapers having a circulation of over 20,000 copies. The court overturned the statute not because it had an economic impact on newspapers but because it was designed to stifle opposition to the Louisiana political machine. Simply put, this facially neutral statute was intended to regulate the content of speech. Nor is *Associated Press* v. *United States*, 326 U.S. 1, 89 L.Ed. 2013 (1945), on point. There the Court held only that the first amendment does not insulate news-gathering organizations from the antitrust laws.

Whether or not the Newspaper Preservation Act's limited antitrust exemption should be considered a license, as the Committee argues, we do not find first amendment rights implicated. While we recognize the importance of the antitrust laws in our economic system, one cannot lose sight that these laws are the creation of Congress. They are not mandated by the first amendment or anywhere else in the Constitution. What Congress has passed, it may repeal. Apparently, the Committee's actual dissatisfaction with the Act is based on its belief that certain newspapers are treated differently, i.e., preferentially. But there is no question that other newspapers in the Seattle area, large or small, may participate in a joint operating agreement if they qualify.

Finally, we see no "vague and overbroad" delegation of power to the Attorney General. First of all, as discussed above, we fail to see any clearly defined first amendment injury. Secondly, our interpretation of the Act rejects the

argument that it is overly vague. The Attorney General must base his approval of a proposed JOA on the requirements in the Act as we have interpreted them in this opinion. Nothing more definite is required. *See, e.g., Arnett* v. *Kennedy*, 416 U.S. 134, 159, 40 L.Ed.2d 15, 36 (1974).

III. CONCLUSION

We agree with the district court to the extent it held that the alternatives to a joint operating agreement, including sale to a capable noncompeting buyer, are relevant to the determination that a newspaper qualifies for an antitrust exemption under the Newspaper Preservation Act. It is evident, however, that the Times Company and Hearst sufficiently negated the possibility that any such alternatives were available in this case. We reverse the district court for that reason.

The other arguments in support of overturning the Attorney General's approval of the Post-Intelligencer's joint operating agreement are better placed before Congress. The Newspaper Preservation Act was not intended to create antitrust immunities for any newspapers which simply allege they are having difficulties. However, neither does it contain an array of implied conditions which in effect would reinstate the *Citizen Publishing* standards. Simply put, we will not emasculate the Act in the guise of narrowly construing it. We therefore affirm the district court on the issues raised by the Committee's cross-appeal.

Costs are awarded to appellants. The decision of the district court is AFFIRMED IN PART and REVERSED IN PART.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-3488,
82-3493, and
82-3523

D.C. No. CV 82-730

COMMITTEE FOR AN INDEPENDENT P-I,
PEOPLE OPPOSED TO A ONE-NEWSPAPER TOWN,
COMMITTEE FOR A FREE PRESS,
LONGVIEW PUBLISHING CO., *et al.*,
Plaintiffs-Appellees-Cross-Appellants,

vs.

THE HEARST CORP. AND THE
SEATTLE TIMES CO.,
Defendants-Appellants-Cross-Appellees,

and

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL FOR THE UNITED STATES,
Defendant-Appellant-Cross-Appellee.

ORDER

FILED
APR 29 1983
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

Before: ANDERSON, HUG, and POOLE, Circuit Judges.

The opinion in the above-entitled case filed April 21, 1983, is amended to make the following corrections:

1. Page 3, line 10: Change the word "trustr" to read "trust."

2. Page 5, line 1: Replace the word "Smith" with "The Attorney General."

3. Page 6, line 5: Change to "The Proposed JOA is not unnecessarily *anti*competitive."

4. Page 11, line 21: Correct cites to read "394 U.S. *at* 137-138, 22 L.Ed.*2d at* 155-156."

5. Page 14, line 8: Correct cite to read "22 L.Ed.*2d* at 156."

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C82-730R

COMMITTEE FOR AN INDEPENDENT P-I, a corporation, *et al.*,

Plaintiffs,

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court upon cross motions for summary judgment by the four parties. Having reviewed the motions, memoranda of counsel, and the entire record, the court finds and rules as follows:

I. BACKGROUND

The Seattle Times Company ("Times") and the Seattle Post-Intelligencer ("P-I") have been for many years the only two metropolitan daily newspapers in Seattle. On March 27, 1981 the Times and the Hearst Corporation ("Hearst"), as publisher of the P-I, filed an application with the Attorney General of the United States, William French Smith, for approval of a joint operating arrangement ("JOA"), pursuant to the Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.* The Act authorizes a limited exemption from the antitrust laws for a JOA if the parties obtain the prior written consent of the Attorney General. In order to grant approval of a JOA, the Attorney General must find that one of the newspapers involved is a "failing

newspaper," defined in the statute as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1803(b), 1802(5).[1] The Attorney General must also find that approval of the arrangement would effectuate the policy and purpose of the Act. 15 U.S.C. § 1803(b).

The congressional policy underlying the Act is to maintain a newspaper press editorially and reportorially independent and competitive. 15 U.S.C. § 1801. The term "joint operating arrangement" is broadly defined. It includes almost any form of arrangement or joint venture between two or more independently-owned newspapers "pursuant to which joint or common production facilities are established or operated," provided that "there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined." 15 U.S.C. § 1802(2). A JOA allows the elimination, therefore, of commercial competition between the newspapers.

The procedures by which application may be made to the Attorney General for his approval of a JOA are set forth in regulations of the Department of Justice at 28 C.F.R. § 48. The Assistant Attorney General in charge of the Antitrust Division initially submits a report to the Attorney General recommending either that the proposed JOA be approved or disapproved or that a hearing be held to resolve material issues of fact. 28 C.F.R. § 48.7. When a hearing is held, the Antitrust Division becomes a party. *Id.* at § 48.10(b). Here, the Assistant Attor-

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[1] Section 1803(b) provides:

It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

ney General for the Antitrust Division recommended that the Attorney General direct a hearing to resolve various issues of fact. After receiving replies and supplemental materials from applicants and comments by those opposed to the JOA, the Attorney General ordered a hearing on the application and directed that it be held in Seattle, Washington.

On September 29, 1981, Daniel H. Hanscom was appointed administrative law judge (ALJ) to conduct the hearing. Under the Attorney General's order the hearing record had to be closed within 60 days after appointment and a recommended decision rendered within 20 days thereafter. On September 30, 1981, the Attorney General directed the ALJ to permit the participation of intervenors opposed to the application. The intervenors, who are the plaintiffs in this action, are various groups made up of employees of the P-I, advertisers, subscribers and publishers of other newspapers in the neighborhoods or suburbs of Seattle, and local journalists and consumers. The intervenor-plaintiffs have been jointly represented by single counsel.

The hearing began in Seattle on November 2, 1981, and continued for three and one-half weeks. A voluminous record of testimonial and documentary evidence was developed at the hearing, which concluded with oral argument and the submission by the parties of proposed findings and memoranda of law to the ALJ. Both the intervenors and the Antitrust Division opposed approval of the application. On January 14, 1982, the ALJ issued his Recommended Decision, including 162 Findings of Fact and a Memorandum Opinion which recommended that the proposed JOA be approved. The Antitrust Division strongly recommended against approval stating that the "legal errors we perceive here are not only of significance to the Seattle application, but also set an erroneous precedent for future proceedings under the Act." The Attorney General adopted the findings and conclusions of the ALJ with the exception of the portion of Finding of Fact 158 which stated that the P-I could be sold "to a person or firm who could, and would, continue it in operation as an independent metropolitan daily."

The Attorney General's order was filed on June 15, 1982 and would have allowed the JOA to go into effect on June 25, 1982, but on June 24, 1982 this court issued its order postponing the effective date of the Attorney General's order until August 27, 1982.

The plaintiffs raise various issues:

1) There is no support for the Attorney General's refusal to adopt the ALJ's finding that the P-I could be sold at fair market value to a person who would continue that newspaper in operation as an independent metropolitan daily, and, given that finding by the ALJ, the application should have been denied;

2) On the record before the ALJ regarding the financial condition of the P-I, the P-I cannot be "in probable danger of financial failure;"

3) The Attorney General improperly determined that approval of this application would effectuate the policy and purpose of the Act because this JOA is unnecessarily anticompetitive and would injure and impair the editorial voices of smaller newspapers in the market;

4) The Newspaper Preservation Act is unconstitutional in that it violates First Amendment rights to free speech and free press.

II. STANDARD OF REVIEW

A. Factual Determinations

The Newspaper Preservation Act contains no specific statutory provision for review of the Attorney General's order granting or denying applications for a JOA. The parties agree that the Administrative Procedure Act governs and that this court has jurisdiction to review the order pursuant to 5 U.S.C. § 701 *et seq.* The parties do dispute the scope of the court's review. 5 U.S.C. § 706 provides:

> to the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or. . . .

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Plaintiffs claim the § 406(2)(E) applies here because there was an agency hearing pursuant to the regulations, 28 C.F.R. §§ 48.7, 48.10. Defendants argue that § 706(2)(E), by its own terms, applies only to cases where the hearing is "provided by statute." *Automobile Club of New York, Inc.* v. *Cox*, 592 F.2d 658, 664 (2d Cir. 1979). The court's disposition of this action makes it unnecessary to decide whether hearings provided for by regulation suffice to bring review within the "substantial evidence" provision. The issues which require the court to consider factual aspects of the record must be decided against plaintiffs even if the "substantial evidence" standard is followed.

B. Legal Determinations

1. Deference to the Attorney General's Interpretation of the Act

The United States Supreme Court has repeated many times that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. *E.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). In *Red Lion* the Court wrote that this was specifically true when Congress has refused to alter the administrative construction. In that particular case,

Congress had even ratified the administrative position by positive legislation. However, a reviewing court must never shy from its duty to carefully examine the agency's interpretation of the law; to do otherwise is to deny meaningful review. An order may not stand if the agency has misconceived the law. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171-72 (1971); *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943); *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025, 1037 (8th Cir. 1978) *aff'd*, 440 U.S. 689 (1979).

Courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968), *quoting*, *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965).

Even under the "arbitrary and capricious" standard urged by the Attorney General and the JOA applicants, the court finds that the Attorney General has erred as a matter of law.

2. Narrow Construction of Antitrust Exemptions

Statutory exemptions to the antitrust laws, as plaintiffs point out, are to be narrowly construed. *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979). This rule in no way conflicts with the standard of this court's review nor with the proposition that the court's paramount concern is to construe the exemption in light of its statutory mandate and its legislative history. *Id.* at 211.

III. THE PROSPECTIVE BUYER ISSUE

According to the plaintiffs, the Attorney General's order "rests upon the erroneous assumption of law that a newspaper proprietor can deliberately block . . . a sale to a new owner willing and able to carry on independent publication," and still obtain an antitrust exemption under the Newspaper Preservation Act. In his findings of fact, the ALJ found that the position of the Hearst Corporation has consistently been that the P-I is not for sale. ALJ's Recommended Decision ("ALJ's Decision"),

p. 83, Finding of Fact ("FF") 153. He also found that, although the P-I is not for sale, there have been serious inquiries from time to time from apparently responsible, potential buyers and he listed details of the inquiries. ALJ's Decision, p. 83, FF. 157. The ALJ's crucial finding was FF 158:

> Considering that the Post-Intelligencer is not, and has not been for sale, and that all inquiries regarding possible purchase have been rebuffed by The Hearst Corporation with statements to that effect, and that responsible prospective purchasers nevertheless continue to appear and express an interest in buying the Post-Intelligencer, it must be concluded that the Post-Intelligencer could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily.

Id.

The ALJ found as a matter of law:

> The Hearst Corporation is not required to offer the Post-Intelligencer for sale, or to demonstrate that it cannot be sold to a buyer willing and able to continue it in operation as an independent editorial voice, as a condition for approval of the joint operating arrangement with the Seattle Times.

Id. at 88-89.

Elsewhere, the ALJ recognized that Hearst had the burden of proving that the P-I is in "probable danger of financial failure" and is a "failing newspaper." He found that Hearst had sustained this burden. ALJ's Decision at 88. But, according to the ALJ, that burden does not carry a requirement that a

> failing newspaper demonstrate that there are no buyers and no alternatives as a condition for entering into a joint operating arrangement. The Hearst Corporation, in short, does not have to put the Post-Intelligencer up for sale before it can qualify as a "failing newspaper" under the Newspaper Preservation Act.

Id. at 90.

The Assistant Attorney General for the Antitrust Division filed exceptions to the recommended decision of the ALJ ("AAG's Exceptions"). According to the Antitrust Division, the ALJ's conclusion that the proposed JOA should be approved was "plain error of law" in light of the ALJ's FF 158 that the P-I could be sold at fair market value to a buyer who would continue it in operation. AAG's Exceptions at 12.

> Where such purchasers are available, the allegedly failing newspaper cannot be deemed "in probable danger of financial failure," and elimination of commercial competition is not justified.

Id. at 17. The Division noted that the Times-P-I application was the first for which the Assistant Attorney General recommended denial. *Id.* at 3. It is the Antitrust Division's opinion that the ALJ's interpretation of the Act is inconsistent with congressional intent and rational economic analysis.[2] *Id.* at 5.

The Attorney General did not follow the Antitrust Division's recommendation, but instead approved the application for the JOA. He adopted the findings and conclusions of the ALJ with the exception of the portion of FF 158 which provides that the "P-I could be sold 'to a person or firm who could, and would, continue it in operation as an independent metropolitan daily.' " Opinion and Order of the Attorney General ("A.G.'s Order"), p. 5. The Attorney General gave as his reason that he could find no evidentiary support for such a finding in the record. *Id.* He gave no elaboration on the evidence, or lack thereof, regarding the buyer issue. The court finds that the Attorney General's rejection of FF 158 was arbitrary and capricious.

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[2] The Antitrust Division's opinion was based on what it saw as two legal errors of the ALJ. One was the ALJ's treatment of the buyer issue. The other issue was the ALJ's exclusion, as a matter of law, of evidence on an incremental analysis of the P-I's financial condition. Plaintiffs have not raised the latter issue here, but maintain that even without such analysis, the P-I failed to prove it was in probable danger of financial failure.

In support of the Attorney General's rejection of FF 158, the defendants offer the facts that no prospective buyer testified at the administrative hearing, FF 158 does not define fair market value, and the record is silent about whether a buyer could bring the P-I to profitability. The obvious response is that the record is barren or insufficient on those questions because the P-I has consistently rebuffed all would-be purchasers, and the ALJ did not solicit such testimony because of his legal conclusion that it was irrelevant. There is extensive evidence in the record regarding inquiries by prospective purchasers, and Hearst discusses it arguing that evidence of inquiries is not evidence that the P-I could be sold.

The crux of the problem is whether a correct definition of a "failing newspaper" must include a consideration of the existence of willing buyers. The answer lies in the legislative history of the Newspaper Preservation Act. The term "failing newspaper" is defined in the Act as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1802(5).[3] The "failing newspaper" test was an express repudiation of the "failing company" defense used in antitrust law and applied by the Supreme Court in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969).

Citizen involved a challenge by the Justice Department to a JOA entered into by two Tucson, Arizona newspapers. The Court held that in order to qualify as a "failing company," a newspaper would have to have been on the brink of liquidation, would have to show that there were no alternatives to a JOA, and would have to establish that there were no prospective noncompeting buyers. 394 U.S. at 137-38. While the case was

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[3] The test applicable to prospective arrangements is more stringent that the one for JOAs already in effect when the Act was passed. For existing arrangements, it was necessary that, at the time the arrangement was entered into, not more than one of the newspapers "was likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a).

pending before the Supreme Court, bills had been introduced in both houses of the 90th Congress to immunize the two Tucson papers as well as the 21 other JOAs already in existence. *See, e.g.*, S. 1312, 90th Cong., 1st Sess. (1967); H.R. 19123, 90th Cong., 2d Sess. (1968). When the Supreme Court's opinion was issued, bills were reintroduced. The exemption extended in the bills was more limited than in the earlier bills. *See* S. 1520, 91st Cong., 1st Sess. § 4(b)(1969); H.R. 270, 91st Cong., 1st Sess. § 4(b)(1969). See statements of Representatives McCulloch, Railsback, and Edwards during House debate. 116 Cong. Rec. 23148, 23154, 23167 (1970).

The bill finally enacted was intended by Congress to permit newspapers to enter into a JOA before their financial conditions deteriorated to the point where the "failing company" defense would be of no use:

> The most important assets of a newspaper are its personnel and reputation, and these may be lost as financial failure approaches. Generally by the time the newspaper is sufficiently beyond hope to satisfy the 'failing company' test of the courts, it may well be of little value as an acquisition. Yet under present law the courts have to apply the extremely narrow 'failing company' doctrine as it has developed in those industries lacking the unique characteristics of the newspaper business.

Statement of Congressman Annunzio. 116 Cong. Rec. 23168 (1970). Relying on similar statements and the clear intent of Congress to relax the test set forth in *Citizen*, the ALJ concluded that there was no requirement that a failing newspaper demonstrate that there are no buyers and no alternatives as a condition for entering into a JOA. ALJ's Decision at 90. The ALJ also rejected the plaintiffs' view that the "failing newspaper" test is derived from the standard for judging bank mergers under the Bank Merger Act, 12 U.S.C. § 1828(c).

The Senate Report states that the phrase "in danger of probable failure" [sic] is taken from the Bank Merger Act:

> This proposed legislation, as amended, creates a realistic definition of a failing newspaper by establishing a less

> stringent test than that applied in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131. The failing company doctrine is court created. It has been recognized by the Congress in the Cellar-Kefauver Act, and Congress has in the past demonstrated its ability to reshape this doctrine to fit specific situations. Such was done in the Bank Merger Act of 1966, where the Congress devised a less stringent failing test for banks, subsequently accepted by the Supreme Court in the Third National Bank of Nashville decision.

S. Rep. No. 535, 91st Cong., 1st Sess. 6 (1969). Despite the fact that the House Report contains no reference to the Bank Merger Act, as noted by the ALJ, the legislative history indicates that the House also intended the "failing newspaper" test to be similar to the test applied to bank mergers. During House debate, there was objection that the term "probable danger of financial failure" was loosely drawn. Congressman Kastenmeier, the floor leader for the bill,[4] stated:

> The term "in probable danger of financial failure" is one that has a legislative history. It comes out of the Bank Merger Act. It is understood by the courts in the field, and happens to be a term that is well known.

116 Cong. Rec. 23146 (1970).

In a cogent analysis of the legislative history bearing on the issue under consideration, Administrative Law Judge Donald R. Moore concluded that Congress intended the "failing newspaper" test to be interpreted with reference to the substantive standards established by the Supreme Court in *United States* v. *Third National Bank*, 390 U.S. 171 (1968).[5] As ALJ Moore

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[4] The Supreme Court has often emphasized the statements of the floor manager of a bill to support its interpretation of an ambiguous provision. *See, e.g., Guessefeldt* v. *McGrath*, 342 U.S. 308, 311 (1952); *Bindczyck* v. *Finucane*, 342 U.S. 76, 83 (1952); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 235 (1942).

[5] *See* In the Matter of Application by The Cincinnati Inquirer, Inc., and the E. W. Scripps Company for Approval of a Joint Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. § 1801, *et seq.*, Recommended Decision, pp. 118-128.

observed, "probable failure" is not the statutory test for determining the legality of bank mergers. However, certain notices and waiting period provisions may be dispensed with if the agency finds that it must act immediately to prevent the "probable failure" of one of the banks involved. 12 U.S.C. § 1828(c)(3), (4), (6). In *Third National Bank* the Supreme Court defined the purpose of the Bank Merger Act in language analogous to the congressional declaration of policy in the Newspaper Preservation Act, 15 U.S.C. § 1801.

The Court lay down factors to be weighed to determine whether the risk of a bank's failure was great enough to justify an anticompetitive merger: "the feasibility of curative measures short of merger," whether "healthy aspects of the bank's condition . . . removed any danger of failure in the foreseeable future," and whether "the injury to the public interest flowing from the loss of competition could be avoided and the convenience and needs of the community benefited in ways short of merger but within the competence of reasonably able businessmen." 390 U.S. at 187-89. The applicants for the merger must "reliably establish the unavailability of alternative solutions." *Id.* at 190. The Court held that the District Court erred when it failed to consider the possibility of the infusion of new management or the possibility of a sale to a party other than the bank's major competitor.

> If . . . another competent businessman with a willingness to tackle the management problems of the bank had offered to buy out the Weaver interests at an acceptable price, it seems obvious that the Weaver group . . . should not be permitted to merge and to ignore an available alternative.

Id. at 189. Statements made by both Senators and Representatives during congressional debate reinforce the conclusion that, under the Newspaper Preservation Act, a JOA should be approved only if there are no alternatives that would permit continued publication of the allegedly failing newspaper. Senate Debate, 116 Cong. Rec. 1786, 1795, 2004, 2006 (1970); House Debate, 116 Cong. Rec. 23148, 23154 (1970).

Judge Moore concluded that Congress did not intend to require a search for or consideration of noncompeting purchasers as an absolute prerequisite to the approval of a JOA. However, "[i]f an alternative solution might be the sale of the newspaper to someone else, that alternative must have been explored before approval may properly be granted." ALJ Moore's Recommended Decision at 126-27. Except for that portion dealing with the issue of incremental analysis, Administrative Law Judge Moore's Recommended Decision was adopted by Attorney General Benjamin Civiletti in his Order of November 26, 1979. The fact that the Attorney General's position on the "failing newspaper" test and the buyer issue has changed with Attorney General Smith's Order in this case has direct bearing on the question of the scope of this court's review. The "agency's" interpretation of the law on this question is of very short duration, is inconsistent with prior agency interpretation, and has never been expressly or implicitly reviewed by either the courts or Congress. See the discussion regarding *Red Lion Broadcasting*, *supra* at p. 7 of this order. Judge Moore recommended approval of the Cincinnati JOA because the evidence did not support a conclusion that there was another party ready, willing, and able to purchase the Post and to improve its operating results so as to permit its preservation as an independent daily. *Id.* at 128. That conclusion is the opposite of FF 158 made by ALJ Hanscom. The court agrees with ALJ Moore's analysis. Based on the hearing record in this case and the ALJ's FF 158, approval of the Times-P-I JOA cannot be granted without exploring the alternative of sale to a noncompetitor.

The Attorney General's approval not only rejected FF 158, but also stressed that the P-I was a "failing newspaper" in light of the ALJ's FF 109 at 59:

> [T]he evidence does not establish that new management would be any more successful than Hearst and current management of the Post-Intelligencer in returning it to profitability.

Where the record establishes that there are competent businessmen ready and willing to tackle the management prob-

lems of the P-I, the burden of proof rests upon the applicants for the JOA to demonstrate that the new owners could not make the P-I succeed. 28 C.F.R. § 48.10(a)(4). There has been no fair opportunity for prospective buyers to prepare and present their plans to make the P-I profitable. The court wishes to make clear that it does not disagree with the ALJ that Hearst is not obligated to seek out buyers. Nevertheless, where there are ready and willing buyers who present themselves, if Hearst wishes to obtain the benefits of the JOA, it must carry the burden of demonstrating that none of those buyers could continue to operate the P-I as an independent daily.

In short, in order for the P-I to qualify as a "failing newspaper" for purposes of a JOA, defendants must show that no other viable alternatives exist for maintaining the newspaper's independent editorial voice. This result is consonant with both the policy and purpose of the Newspaper Preservation Act and with the narrow construction to be accorded antitrust exemptions. Construing the Act to require that defendants demonstrate (and the ALJ or Attorney General consider) alternatives without anticompetitive impact is a reasonable and just fulfillment of the important public purposes of preserving both independent editorial voices and competition.

IV. THE "PROBABLE DANGER OF FINANCIAL FAILURE" ISSUE

Plaintiffs assert that the ALJ and Attorney General also applied the incorrect legal standard to the definition of "in probable danger of financial failure." Plaintiffs insist that, even without the JOA, Hearst has no intention of closing the P-I, and point out that §§ 1802(5), 1803(b), require the likelihood of actual closure.

It appears to the court that the ALJ did actually consider and apply "the likelihood of actual closure" factor in applying the "probable danger of financial failure" test. The ALJ found that without Hearst's backing the P-I "probably could not have continued to exist." ALJ's Decision at 88. The issue before the

court, therefore, is not the correctness of the legal standard, but whether the evidence in the record supports the ALJ's conclusion.

Plaintiffs point to evidence in the record that the owners did not intend to close the P-I, that the P-I's losses have been modest by industry standards, that circulation and advertising trends have been mixed, and that Hearst mismanaged the P-I. All of this evidence was presented to the ALJ who received it, weighed it and found that the P-I was in danger of failing and probably could not have continued to exist without Hearst backing. ALJ's Decision at 88. This court cannot reevaluate the ALJ's factual determinations and impose its own interpretation. Even if the court were to apply the substantial evidence test urged by plaintiffs, the Attorney General's adoption of the ALJ's findings and conclusions regarding the P-I's financial condition must stand.

V. ISSUE OF INJURY TO SMALLER PAPERS AND JOA TERMS THAT ARE UNNECESSARILY ANTICOMPETITIVE

Plaintiffs take issue with the Attorney General's conclusion that the JOA would effectuate the policy and purpose of the Act. They argue that this conclusion is incorrect where the implementation of the JOA would injure and impair the editorial voices of smaller newspapers in the market and where the terms of the JOA are unnecessarily anticompetitive. It is obviously true, as plaintiffs state, that the purpose of the Act is to preserve a diversity of editorial voices in the community. But plaintiffs cite no authority to support their claim that the Attorney General must find that competing newspapers will not be harmed by the JOA, or that its terms are the least restrictive possible.

The legislative history contradicts the plaintiffs' position. During the congressional debates, Senators and Representatives spoke about the possible injurious effects of a JOA on smaller newspapers. The opponents of the Act either urged that the bills be defeated or proposed amendments to cure that

defect. None of these views prevailed. *See* 116 Cong. Rec. 1816, 1996 (1970) (amendment proposed by Senator McIntyre); 116 Cong. Rec. 23149-50 (1970) (Representative McGregor). Senator Hruska, the Senate floor manager of the bill, spoke at length about the purpose and policy behind the Act. It is clear that the concern was to save papers which would otherwise disappear. The Act was drawn so as to keep the antitrust exemption narrow. Before approving a JOA, there had to be a finding that the JOA was "essential and justified" and that the applicant had tested alternatives before turning to a JOA. 116 Cong. Rec. 2005 (1970); *see also* statements of Rep. Kastenmeier, 116 Cong. Rec. 23146-48 (1970). Once such a finding is made, nothing more is required; nothing in the statute or its history indicates otherwise. The court rejects plaintiffs' argument. Where a JOA is otherwise legal there is no requirement that the Attorney General must find that there will be no injury to other newspapers or that the terms of the JOA are the least restrictive.

VI. THE FIRST AMENDMENT ISSUES

Plaintiffs make two constitutional arguments. They claim that the statute is unconstitutional under the First Amendment as it is applied in the present case, *i.e.*, where there are smaller newspapers competing with the two applicants, as here, approval of the JOA is a license to engage in otherwise illegal activity that will impair the First Amendment rights to free speech and press of the smaller papers. Plaintiffs' second claim is that the statute is unconstitutional on its face because it is a vague and overbroad delegation of power in an area affecting First Amendment rights. The court rejects both arguments.

The Act as applied does not license or regulate the content of speech. Plaintiffs' assertion that this JOA will have an economic effect which, in turn, will adversely affect the editorial voices of smaller newspapers is speculative. In any case, there is nothing in the Act itself or its present application to support

their contentions. Two other courts have considered these same arguments.

> This argument, however, ignores the conceptual difference between newspaper competition in the "economic sense" and "editorial and news gathering competition." Complete freedom of the press does not necessarily depend upon a free competitive economic market. The NPA can only be said to offend the first amendment if it in some way restrains the freedom of the press in some direct fashion.

City & County of Honolulu v. *Hawaii Newspaper Agency, Inc.*, 7 Media L. Rep. (BNA) 2495, 2497 (D. Hawaii 1981).

> The Act pertinent to this case does not confer any license to monopolize and indeed has a specific provision prohibiting "predatory practices" (§ 1803(c)). The case of Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), relied on heavily by the plaintiffs, is clearly inapplicable. In that case the Supreme Court ruled unconstitutional a state taxing statute that was clearly aimed at certain large metropolitan newspapers that had opposed the political machine then in control of that state. It was clear and obnoxious political reprisal against the press by a corrupt demagogue. There is simply no comparison between that factual situation and the one underlying the instant legislation.
>
> Here the Act was designed to preserve independent editorial voices. Regardless of the economic or social wisdom of such a course, it does not violate the freedom of the press. Rather it is merely a selective repeal of the antitrust laws. It merely looses the same shady market forces which existed before the passage of the Sherman, Clayton and other antitrust laws.

Bay Guardian Co. v. *Chronicle Publishing Co.*, 344 F. Supp. 1155, 1158 (N.D. Cal. 1972).

Both courts also addressed the overbreadth question and, again, rejected the argument.

> Without commenting upon the wisdom of the Act, the Court does not read it to impose restraints upon the plaintiffs' ability to publish their newspaper. Indeed the Act

> specifically forbids newspapers operating under a joint operating agreement from; ". . . predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity." (§ 1803(c))

Bay Guardian Co., 344 F. Supp. at 1159. *See City & County of Honolulu*, 7 Media L. Rep. at 2499. Plaintiffs attempt to distinguish the *Bay Guardian* and *Honolulu* cases on the ground that they dealt with "grandfathered" arrangements which pre-existed passage of the statute. The distinction is without merit.

Plaintiffs also contend that the Attorney General has an "untrammeled delegation of licensing power," because the Act's standards are unconstitutionally vague. If this argument were correct, this court would have been unable to reach the conclusion it arrived at on the buyer issue. The statutory words "probable danger of financial failure" and "effectuate the policy and purpose of the Act" are not as unclear and undefined as plaintiffs depict. They are clear and defined enough to establish a standard which the Attorney General must follow. The court rejects the plaintiffs' constitutional arguments.

ORDER

The court having considered the record and the evidence contained therein and the briefs of all the parties, and having set forth its reasoning, including its findings and conclusions in the foregoing opinion, it is now, therefore, ORDERED that:

The order of the Attorney General approving the Joint Operating Agreement between the Times and P-I is contrary to law and therefore invalid. Plaintiff's motion for summary judgment must be, and hereby is, GRANTED.

The Clerk of the Court is directed to send uncertified copies of this Order to counsel of record.

DATED at Seattle, Washington this 27th day of August, 1982.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CIVIL ACTION FILE NO. C82-730R

COMMITTEE FOR AN INDEPENDENT P-I, *et al.*,

vs.

WILLIAM FRENCH SMITH, *et al.*

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Barbara J. Rothstein, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiffs' motion for summary judgment is granted.

Filed In The
United States District Court
Western District of Washington
AUG 30 1982
BRUCE RIFKIN, Clerk
By _____ Deputy

Dated at Seattle, Washington this 30th day of August, 1982.

/s/ Elizabeth Tyree
ELIZABETH TYREE
Deputy Clerk of the Court

Office of the Attorney General
Washington, D.C. 20530

OPINION AND ORDER OF THE ATTORNEY GENERAL REGARDING THE APPLICATION OF SEATTLE TIMES COMPANY AND THE HEARST CORPORATION FOR APPROVAL OF A JOINT OPERATING ARRANGEMENT

Order No. 979-82

I. BACKGROUND

On March 27, 1981, the Seattle Times Company, a publisher of the Seattle Times, and the Hearst Corporation, publisher of the Seattle Post-Intelligencer ("Applicants"), filed an application for approval of a proposed joint operating arrangement in Seattle pursuant to the Newspaper Preservation Act, 15 U.S.C. §§ 1801 *et seq.* The Act authorizes a limited antitrust exemption for a joint operating arrangement if the parties obtain the prior written consent of the Attorney General.

Before granting approval of a joint operating arrangement, the Attorney General must find that one of the newspapers involved is a "failing newspaper," defined in the statute to mean "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. §§ 1803(b), 1802(5). He must also find that approval of the arrangement would effectuate the policy and purpose of the Act. The applicants have the burden of proving the proposed arrangement satisfies the requirements of the Act. 28 C.F.R. § 48.10(a)(4). Here the application alleged that the Seattle Post-Intelligencer was a "failing newspaper."

The term "joint newspaper operating arrangement" is defined to include almost any form of arrangement or joint venture between two or more independently-owned newspapers "pursuant to which joint or common production facilities are established or operated," provided that separate editorial and reportorial staffs are maintained, and "that editorial policies be independently determined." 15 U.S.C. § 1802(2). Thus, a joint operating arrangement is a means of preserving the indepen-

dent editorial voice of a newspaper found to be "failing" within the purview of the Act.

Pursuant to the regulations which govern the review and approval of joint operating arrangements under the Act (28 C.F.R. Part 48) and after a review of the application, the May 29, 1981 Report of the Assistant Attorney General for the Antitrust Division and public comments, I ordered that a hearing be convened in Seattle to resolve material issues of fact. Order No. 953-81 (August 7, 1981). In order to prevent unnecessary delays in the presentation of evidence, Order No. 953-81 required that the hearing record be closed within 60 days of the appointment of an Administrative Law Judge.

On September 29, 1981, I granted the intervention petitions of several groups opposed to the application. Order No. 959-81. These groups included the Committee for an Independent P-I; People Opposed to a One Newspaper Town; Committee for a Free Press; Longview Publishing Co.; Robinson Newspapers, Inc.; Fournier Publishing Co.; and the Northshore Citizen (hereafter referred to collectively as "Intervenors"). The Intervenors were jointly represented by single counsel and together with the Applicants and the Antitrust Division constituted the parties to the hearing.

On September 30, 1981, Daniel E. Hanscom was appointed Administrative Law Judge and presided over the development of the hearing record, including discovery and the adversarial presentation of documentary and testimonial evidence. During the course of the proceedings the Antitrust Division sought Interlocutory review by the Attorney General of a ruling by the Administrative Law Judge which barred discovery or presentation of evidence concerning "incremental analysis," a means of evaluating the economic relationship between the Hearst Corporation and its subsidiary, the Seattle Post-Intelligencer ("P-I"), which the Antitrust Division contends is relevant to the determination of whether the P-I is a "failing newspaper" under the Act. I declined to entertain the Antitrust Division petition on the merits at that time due to its

interlocutory character and in view of the need for expedition. However, I expressly reserved judgment on the question whether as a matter of law "incremental analysis" is a relevant area of inquiry under the Act. Order No. 962-81 (November 9, 1981). The Antitrust Division was permitted to make its incremental analysis presentation in the form of an offer of proof.

A voluminous record of testimonial and documentary evidence was developed at the hearing, which concluded with oral argument and the submission by the parties of proposed findings and memoranda of law to the Administrative Law Judge. At that time both the Antitrust Division and the Intervenors opposed approval of the application. On January 14, 1982, the Administrative Law Judge issued a Recommended Decision, including 162 Findings of Fact and a Memorandum Opinion which recommended that the proposed joint operating arrangement be approved. On March 4, 1982, after the parties had filed exceptions to the Recommended Decision and responses to those exceptions, the matter became ripe for my decision.

II. FINDINGS AND CONCLUSIONS

The Newspaper Preservation Act requires the Attorney General to pass upon the merits of applications by newspapers for limited exemptions from the antitrust laws. Manifestly, unfettered competition in the marketplace should be promoted whenever possible. When the Congress, however, has seen fit to provide for exemptions from the procompetitive mandate of the antitrust laws, the legislative purpose must be observed. Moreover, while exemptions from the antitrust laws must be construed narrowly, they must not be construed more narrowly than the express language of the statute and other reliable indicators of legislative purpose permit.

Upon review of the applicable law, the hearing record, the recommendation of the Administrative Law Judge and the exceptions and responses filed with respect to that recommendation, I have decided to adopt the findings and conclusions of the Administrative Law Judge with the exception of that por-

tion of Finding 158 which provides that the P-I could be sold "to a person or firm who could, and would, continue it in operation as an independent metropolitan daily." I cannot find evidentiary support for such a finding in the record upon which my decision must be based. *See* 28 C.F.R. § 48.13.

By its plain terms, the Newspaper Preservation Act provides a limited antitrust exemption for newspaper joint operating arrangements if the Attorney General determines that "not more than one of the newspaper publications involved . . . is a publication other than a failing newspaper" and that "approval of such arrangement would effectuate the policy and purpose of [the Act]." 15 U.S.C. § 1803(b). The Act defines a "failing newspaper" as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1802(5).

Under well-established canons of statutory construction, I must give effect to the words chosen by Congress. It is apparent from the express language of the statute that the "failing newspaper" analysis under the Act must focus upon the financial condition of the particular publication at issue, and that "danger of financial failure" must be assessed as a matter of probabilities, not certainties. The legislative history, moreover, corroborates this construction. The hearings and House and Senate reports concerning the Act evince a strong congressional concern about the large number of newspaper closings since World War II and an express desire to create a test for newspaper joint operating arrangements "less stringent" than the "failing company" test set forth in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969). This new test was to provide a special means of ensuring the preservation of editorial voices in individual communities. *See, e.g.*, S. Rep. No. 91-535, 91st Cong., 1st Sess. 4, 6 (1969); H.R. Rep. No. 1193, 91st Cong., 2d Sess. 10 (1969).

In this case, the Administrative Law Judge reviewed in some detail the record evidence, including substantial expert testimony, concerning the P-I's past, present and expected

future financial condition in light of evidence concerning the Seattle market and the newspaper industry generally. The Administrative Law Judge found, *inter alia*, that the P-I had lost in excess of $14.3 million since 1969, that its competitive share of newspaper circulation and advertising revenue in Seattle had eroded substantially (and continues to decline), and that new management probably could not, based upon the record, return the P-I to profitability (*See, e.g.*, Finding 109).

Based upon my consideration of the evidentiary record in light of the language and legislative history of the Act, I am satisfied that the Administrative Law Judge's findings concerning the financial condition and prospects of the P-I and conclusion that the P-I is in probable danger of financial failure are supported by the evidence.

The second determination I am required to make is whether approval of the proposed joint operating arrangement would effectuate the "policy and purpose" of the Act, which is "to preserve the publication of newspapers in [the] city, community or metropolitan area" at issue, "[i]n the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. § 1801. Upon review of the evidence concerning the financial condition of the P-I and the terms of the proposed joint operating arrangement, I have found that the proposed joint operating arrangement will preserve the separate and independent editorial voice of the P-I in Seattle and I agree with the Administrative Law Judge's conclusion that this arrangement will effectuate the policy and purpose of the Act.

A. Incremental Analysis

The Administrative Law Judge reviewed at length the intracorporate financial transactions between the P-I and its parent the Hearst Corporation and found them to be generally reasonable and mutually beneficial. However, the Antitrust Division, joined by Intervenors, contends that the Administrative Law Judge committed an error of law in refusing to admit

and fully to consider proferred evidence concerning "incremental analysis" of these transactions.

The proferred evidence was intended to focus upon the financial impact of the P-I's operations upon its parent corporation in order to establish that although the P-I is operating at a loss, its parent, Hearst, can receive a net financial benefit by operating it. This seeming anomaly is resolved through incremental analysis by disregarding certain concededly legitimate depreciation expenses for balance sheet purposes while including depreciation in the computation of tax benefits accruing to Hearst, and by disregarding certain P-I expenses for Hearst news and management services which are provided on comparable terms throughout the Hearst chain.

The Administrative Law Judge found that the express inclusion of the phrase "regardless of ownership or affiliations" in the definition of "failing newspaper," when read in light of the legislative history of the Act, evinces a congressional intent to focus factual inquiry upon the operations and performance of the particular newspaper alleged to be failing, rather than upon the identity, financial resources or other operations of the owner of that newspaper, and that the application of incremental analysis would be inconsistent with such an inquiry. I agree.

As suggested in Order 962-81 (November 9, 1981), financial relationships between parent corporations and their newspaper subsidiaries are not entirely irrelevant to the "failing newspaper" determination. As the legislative history provides, a parent which "create[s] [a] 'failing newspaper' by artificial bookkeeping entries" can not secure the benefit of the limited antitrust immunity provided by the Act. Sen. Rep. No. 91-535, 91st Cong., 1st Sess. at 5 (1969). Here, however, the Administrative Law Judge found based upon the record that the various intracorporate transactions between Hearst and the P-I were reasonable and that no allegation of culpable mismanagement could be supported by the record. (*See, e.g.*, Findings 80, 92, 94, 109). Accordingly, I am satisfied that the appropriate review of the financial relationship between Hearst and the P-I

was made, and that a more wide-ranging inquiry into Hearst's financial resources and operations is not permitted either by the express language of the Act or its legislative history.

B. The Alternative Purchaser Issue

Both the Intervenors and the Antitrust Division contend that the application must be rejected because Hearst has not offered the P-I for sale and has not made a good-faith effort to find a purchaser ready, willing and able to operate it as an independent publication. They argue that the P-I cannot be considered a "failing newspaper" under the Act because of this failure on the part of Hearst since, in their view, the definition of "failing newspaper" contains such a *per se* requirement.

The plain language of the definition of "failing newspaper" under the Act does not, in terms, contain the *per se* rule advanced by Intervenors and the Antitrust Division. Neither, when read as a whole and in context, does the legislative history suggest that Congress intended inclusion of such a rule. As previously discussed, a thorough review of that history points to the conclusion that through its definition of "failing newspaper," Congress intended generally to ameliorate the effect of *Citizen Publishing Co.* v. *United States*, *supra*, 394 U.S. 131 (1969), on the ability of newspapers to enter into joint operating arrangements. In *Citizen Publishing*, the Supreme Court applied a strict "failing company" test, including a requirement that proponents of a proposed joint operating arrangement prove the nonexistence of other qualified prospective purchasers of the allegedly failing newspaper. I must concur with the Administrative Law Judge that in enacting the Newspaper Preservation Act, Congress intended specifically to eliminate any *per se* rule requiring that a newspaper be offered for sale before it can be found to be a "failing

newspaper," and I decline the invitation to engraft such a rule onto the statute.*

* * *

In view of the foregoing, I conclude from a review of the Act and its legislative history that Congress intended the determination whether a newspaper is "failing" to be made case-by-case, based upon a weighing of all relevant factors and without application of particular *per se* rules. Relevant factors are those which bear upon the financial prospects of the particular newspaper publication alleged to be failing (considered as an independent entity) within the particular market which it serves. These factors must be considered in light of evidence of the economic and competitive realities of the newspaper industry. I am satisfied that the Administrative Law Judge's ultimate conclusion that the Seattle Post-Intelligencer is a failing

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* While the Act does not contain a *per se* requirement that applicants establish the absence of qualified purchasers as an element of the "failing company" case, evidence of purchase offers or negotiations may be pertinent in assessing the financial condition and prospects of the allegedly failing newspaper. Here, however, the Administrative Law Judge concluded, based upon the record, that new management probably could not improve the financial prospects of the P-I.

The Administrative Law Judge also concluded that the P-I could be sold "to a person or firm who could, and would, continue it in operation as an independent metropolitan daily." (Finding 158). As noted previously this fairly speculative conclusion is simply without evidentiary support in the hearing record upon which I am constrained to rely exclusively in rendering my decision. 28 C.F.R. 48.13. Nonetheless, I have carefully considered the record evidence of individuals interested in discussing the purchase of the P-I. In light of that evidence, and the evidence of the P-I's financial performance and prospects, I find that the Administrative Law Judge's conclusions both that the new management probably would not improve the P-I's financial prospects and that the P-I is a "failing newspaper" under the Act are amply supported by the record.

newspaper under the Act was based upon such a consideration of all relevant factors.

Having considered each factual and legal contention raised by the parties, I hereby adopt the Findings of Fact, with the exception of those portions of Finding 158 indicated above, and Conclusions of Law set forth in the January 14, 1982 Recommended Decision of the Administrative Law Judge.

III. ORDER

Upon consideration of the entire record and the applicable law, it is hereby ordered that the Application by Seattle Times Company and the Hearst Corporation for Approval of a Joint Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. 1801, *et seq.* is approved, said approval to become effective on the tenth day after the filing of this decision.

DATE: June 15, 1982

/s/ William French Smith
WILLIAM FRENCH SMITH
Attorney General

Before The Attorney General
of the United States

Recommended Decision
Docket No. 44-03-24-06

In the Matter of:

Application by Seattle Times
Company and the Hearst Corporation
for Approval of a Joint Newspaper
Operating Arrangement Pursuant to the
Newspaper Preservation Act,
15 U.S.C. §§ 1801, *et seq.*

January 14, 1982

Daniel H. Hanscom
Administrative Law Judge

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BEFORE THE ATTORNEY GENERAL
OF THE UNITED STATES

Docket No. 44-03-24-6

IN THE MATTER OF:
APPLICATION OF SEATTLE TIMES COMPANY AND THE HEARST CORPORATION FOR APPROVAL OF A JOINT NEWSPAPER OPERATING ARRANGEMENT PURSUANT TO THE NEWSPAPER PRESERVATION ACT, 15 U.S.C. § 1801, *et seq.*

RECOMMENDED DECISION

This is a proceeding under the Newspaper Preservation Act of July 4, 1970, 15 U.S.C. §§ 1801-04, and regulations promulgated thereunder by the Department of Justice, 28 C.F.R. Part 48. The Seattle Times and The Hearst Corporation, owner of the Seattle Post-Intelligencer, seek approval of a joint operating arrangement entered into between them on January 13, 1981.

The Act permits a limited exemption from the antitrust laws provided approval is granted by the Attorney General. Prior to granting approval the Attorney General must determine that not more than one of the newspapers involved in the arrangement is "other than a failing newspaper," and that approval will effectuate the "policy and purpose" of the Act.

The application for approval was filed on March 27, 1981, and was supported by extensive documentation, financial data, legal memoranda, and other material. According to the application the Seattle Post-Intelligencer is in probable danger of financial failure and a joint operating arrangement with the Seattle Times is essential to preserve it as an editorially and reportorially independent and competitive newspaper.

The application was opposed by a number of organizations and individuals in the Seattle area, including a Committee for an Independent Post-Intelligencer, People Opposed to a One

Newspaper Town, Committee for a Free Press, various suburban newspapers and publishers, and private individuals.

The Assistant Attorney General for the Antitrust Division on May 29, 1981, filed a report and memorandum which recommended that the Attorney General direct a hearing to resolve various issues of material fact. After receiving replies and supplemental materials from applicants, and comments by those opposed to the joint operating arrangement, the Attorney General on August 7, 1981, ordered a hearing on the application, and directed that it be held in Seattle, Washington.

The purpose of the hearing was to determine whether the Post-Intelligencer is a "failing newspaper" within the meaning of 15 U.S.C. § 1803(b) and whether approval of the proposed joint operating arrangement would effectuate the policy and purpose of the Newspaper Preservation Act. Order No. 953-81. With respect to whether the Post-Intelligencer is a "failing newspaper," the following material issues of fact were raised in the Assistant Attorney General's memorandum:

(1) Whether or not appropriately adjusted *P-I* financial statements suggest continuing financial viability of the *P-I*;

(2) Whether or not recent circulation and advertising trends for the *P-I* portend increased revenue opportunities for the newspaper;

(3) Whether or not the *P-I's* expenses will or can be reduced;

(4) Whether or not the *P-I's* equipment is adequate to produce the newspaper and, if not, the magnitude and timing of the investment needed to improve or replace the equipment; and

(5) Whether or not there are qualified prospective buyers for the *P-I*.

These issues of fact have all been resolved, directly or implicitly, in this recommended decision.

On September 29, 1981, the undersigned was appointed administrative law judge to conduct the hearing. Under the Attorney General's order the hearing record had to be closed within 60 days after appointment and a recommended decision rendered within 20 days thereafter.

In the meantime applications for intervention in the hearing had been received and on September 30, 1981, the Attorney General issued an order directing the administrative law judge to permit the collective participation of the groups referred to previously, and the suburban publishers, through a single legal representative as one party. Order No. 959-81.

Accordingly, the parties to this proceeding are the Seattle Times, The Hearst Corporation, the Antitrust Division, and the Intervenors.

Discovery was conducted by the parties prior to and after the appointment of the law judge.

On appointment the undersigned immediately convened a prehearing conference which was held in Seattle on October 6. At this conference a number of discovery issues and other prehearing matters were resolved and a trial date of November 2, 1981, was established. Following the conference of October 6 the parties continued discovery and hearing preparations, interviewed witnesses, and took certain depositions authorized by the undersigned. On October 20 and October 23 rulings on several discovery matters of substantial consequence were issued. These will be discussed later herein. A final prehearing conference was held in Seattle on November 30 at which additional discovery disputes still outstanding were resolved.

Hearings commenced in Seattle on November 2, 1981, and continued for three and one-half weeks. The proceeding developed into a major one with extensive media coverage. Thirty witnesses testified, including executives of the Seattle Times, Post-Intelligencer, The Hearst Corporation, working newspaper staff, former employees of the Post-Intelligencer, experts from Stanford University and the University of Chica-

go, independent public accountants, and others. A record of 4365 pages and over a thousand pages of exhibits was compiled.

The evidentiary phase of the proceeding was completed with oral argument on November 25, 1981, and the hearing record was closed on November 28, 1981, complying with the order of the Attorney General issued August 7, 1981.

Proposed findings and supporting memoranda were received on December 9, 1981. On December 17 Hearst filed an additional paper, not previously authorized, replying to the brief filed by the Antitrust Division. Intervenors and the Antitrust Division were then allowed to file a reply to this unanticipated Hearst submission.

The undersigned found it impossible to study and evaluate the relatively large record transcript and documentary material and to prepare a recommended decision within 20 days. Accordingly, an enlargement of time was requested and granted by the Attorney General to January 15, 1981.

Both Intervenors and the Antitrust Division are opposed to the joint operating arrangement. The Newspaper Guild (Local 82) has filed a brief, also opposing the arrangement, and Jack Jett has filed a statement likewise in opposition.

I. FINDINGS OF FACT

Applicants

1. The Seattle Post-Intelligencer is one of the two major daily newspapers in Seattle, Washington. It is the morning newspaper. The Post-Intelligencer was founded in 1891, one decade short of one hundred years ago and was acquired by the Hearst chain of newspapers in 1921. It is now operated as a division of The Hearst Corporation which has its headquarters in New York City. Daily paid circulation for the six months ending September 30, 1981, averaged 186,003 Monday through Friday, 161,983 on Saturday, and 212,167 on Sunday (Hearst

34A). Annual operating revenues in 1980 were $39,987,872 (Hearst 2F, 4A).

The Hearst Corporation is a closely-held business with extensive operations, including ownership of 15 daily newspapers in addition to the Post-Intelligencer and 30 weekly newspapers. Among the newspapers owned by Hearst are metropolitan dailies in Los Angeles, San Francisco, Baltimore, and San Antonio. The Hearst Corporation also owns magazines and periodicals, trade journals, four television and seven radio stations, book publishing companies, and has interests in real estate and a variety of other business activities (Bennack, Tr. 2120-23).

2. The Seattle Times is the other major newspaper in Seattle. Like the Post-Intelligencer, the Seattle Times was founded in the last century in 1896. Historically, it has been the afternoon newspaper. Recently, however, it has moved toward becoming an all-day paper. In March 1976 the Seattle Times began publishing a morning edition on Saturdays, in early 1979 the morning edition was extended to holidays, and in February 1980 a morning edition was instituted on a daily basis for single copy sale in the city proper and home delivery in outlying areas (Pennington, Tr. 2257-62).

Increasingly in the last two decades the Seattle Times has become the dominant newspaper. A 49.5 percent interest in the Seattle Times is held by the Knight-Ridder chain of newspapers which controls four seats on the Times Board of Directors (Pennington, Tr. 2254-57). Daily circulation for the six months ending September 30, 1981, averaged 254,053 Monday through Friday, 232,654 Saturday, and 333,350 on Sunday (Hearst 34.2A). Annual revenues in 1980 were $86,184,057 and profits were $4,037,022 (Hearst 1DV-1).

The Joint Operating Arrangement

3. After intensive negotiations in late 1980 a joint operating arrangement was agreed to by The Hearst Corporation and the Times and signed January 13, 1981, to be effective

on approval by the Attorney General. The joint operating arrangement is for an initial term of 50 years from approval and provides that the Seattle Times will take over and handle all business and mechanical aspects of the Post-Intelligencer, printing, circulation, advertising, and business office, except that the editorial and reportorial functions will be separate and independent. The Times may not exercise any control over any facet of the Post-Intelligencer's editorial or reportorial functions.

Profits of the joint newspaper operations are to be shared according to a formula which, after an initial three-year period in which the Post-Intelligencer is given a guarantee of a certain minimum amount of revenue, will provide a little over one-third to the Post-Intelligencer and a little over two-thirds to the Times. Prior to the foregoing division, the Times will receive a 6 per cent management fee.

Except under specified exceptional circumstances such as the failure of the joint operating arrangement to generate sufficient revenue to pay the reportorial and editorial costs of either paper, the arrangement may not be terminated short of the 50-year period. As part of the arrangement, the Times will discontinue its morning editions except on Saturdays and holidays. Excluding those days the Times will not bring out any editions between 8 p.m. and 8 a.m., and the Post-Intelligencer will not be published between 8 a.m. and 8 p.m.. A single Sunday newspaper will be published, predominantly the Times, although the Post-Intelligencer will be allocated 6 pages of reportorial and editorial content. The Post-Intelligencer may have additional pages by paying the cost thereof. The Sunday paper will be titled Seattle Times and Post-Intelligencer. Pursuant to the joint operating arrangement the Times may institute joint advertising and joint circulation rates (Pennington, Tr. 2281-89, 2339, 2373-75; Bennack, Tr. 2139-41; Hearst 1).

National Trends Affecting Newspapers

4. It is instructive to view the joint operating arrangement between the Post-Intelligencer and the Seattle Times against the background of national trends affecting metropolitan daily newspapers. Beginning before WW II, but accelerating thereafter, there has been a steady decline in the number of metropolitan daily newspapers serving the major cities in the nation. Where it was once not unusual for a large-sized city to support a number of morning and afternoon newspapers of general circulation, this situation has now become virtually non-existent. Single and two newspapers in cities where three or more once flourished is typical, and large metropolitan areas with only a single newspaper currently exist. Washington, D.C., the nation's capital and a metropolitan area of over three million people presently has only a single newspaper, the Washington Star having shut down in 1981. And in many cities where two separate and independent metropolitan daily newspapers of general circulation still compete, at least one is often found to be in financial difficulty. In many other large cities, both papers are under common ownership or are in a joint operating arrangement. See Prof. Rosse, Tr. 481-93; Morton, Tr. 131-85, Hearst 48, 51, 53.

5. An expert in the newspaper field, John Morton, who has studied daily newspapers in large and smaller communities for many years and who advises large financial institutions contemplating investments or financial transactions in the newspaper industry, testified that the number of competing daily newspapers in metropolitan areas had declined steadily since 1950. Whereas in 1950 there were 99 separate firms publishing newspapers in the 38 markets with the largest newspaper circulation, in 1980 there were 61 (Morton, Tr. 132). The 38 largest newspaper markets are the following:

New York City	Pittsburgh
Chicago	Minneapolis
Los Angeles	Atlanta
Detroit	Newark
Philadelphia	Buffalo

Washington	Indianapolis
Boston	Portland
Cleveland	Phoenix
Houston	Louisville
San Francisco	Cincinnati
Kansas City	San Diego
Denver	Sacramento
Dallas	Columbus
Baltimore	Memphis
St. Louis	New Orleans
Milwaukee	Des Moines
Long Island	San Antonio
Miami	St. Petersburg
Seattle	Oklahoma City

(Hearst 47). Among these largest newspaper circulation metropolitan areas, 6 have joint operating arrangements, one or more of the newspapers having been found to have been a "failing newspaper" or, if the arrangement was formed before July 24, 1970, unlikely to have remained or become financially sound. These were San Francisco, St. Louis, Miami, Pittsburgh, Cincinnati and Columbus (Morton, Tr. 154-58).

Thirteen of the cities or metropolitan areas now contain morning and afternoon newspapers under common ownership, other newspapers having failed and closed down, or having been acquired by the owners of the now surviving papers. These are Kansas City, Minneapolis, Milwaukee, Atlanta, Indianapolis, Portland, Phoenix, Louisville, San Diego, Memphis, Des Moines, St. Petersburg, and Oklahoma City (Morton, Tr. 151-54).

Washington, D.C., as stated, now has only one newspaper. New Orleans, Long Island, and Newark are one-newspaper cities or areas. (Morton, Tr. 150-51).

There remain only 15 urban areas which have separate, independent and commercially competing newspapers (Morton, Tr. 168). These are New York City, Chicago, Los

Angeles, Detroit, Philadelphia, Boston, Cleveland, Houston, Denver, Dallas, Baltimore, Buffalo, Sacramento, San Antonio, and the subject of this proceeding, Seattle. In Mr. Morton's opinion in only 7 of these major markets have daily metropolitan newspapers of general circulation been consistently profitable. These cities are Chicago, Houston, Dallas, Denver, Detroit, Sacramento, and San Antonio (Tr. 169). In two of these cities, Denver and Detroit, there are dailies which have not been profitable in some recent years (Morton, Tr. 161, 166-67).

According to Mr. Morton, the New York Times is the only metropolitan daily in that city which appears to be currently profitable (Tr. 158-59). In Los Angeles, only one of the two dailies is currently making a profit (Tr. 160). In Philadelphia, the Bulletin is in financial difficulty and recently has changed ownership (Tr. 162). In Boston one of the two papers is unprofitable (Tr. 165). In Cleveland, in Mr. Morton's opinion, the Plain Dealer is profitable but the Press, which has recently changed ownership, is unprofitable and unlikely to survive (Tr. 165). In Baltimore one of the two newspapers is unprofitable (Tr. 167), and in Buffalo, both of the newspapers are losing money according to Mr. Morton (Tr. 168).

6. Among the major metropolitan dailies which have shut down or were merged into others since 1950 are the following (where the resulting paper retained both names, the paper with the lesser circulation has been listed):

New York City—New York Sun, Brooklyn Eagle, Mirror, Herald-Tribune, World-Telegram-Sun, Journal-American, World-Journal-Tribune, Bronx Home News
San Diego—Journal
St. Louis—Star Times
Los Angeles—News, Herald-Express, Examiner, Mirror, Mirror-News
Washington—Times-Herald, News, Washington Star
Chicago—American, Daily News, Chicago Today
Boston—Post, Herald-Traveller, Record-American
Philadelphia—News
Cincinnati—Times Star

New Orleans—Item
San Francisco—News
Columbus—Citizen
Detroit—Times
Pittsburgh—Sun-Telegram
Milwaukee—Sentinel
Houston—Press
Indianapolis—Times
Newark—News
Long Island—Star Journal, Press, Review Star
Oklahoma—City Journal
Cleveland—News
Portland—Oregon Journal
St. Petersburg—Independent

(Hearst 48; Morton, Tr. 137). Forty-two large metropolitan daily newspapers in 23 of our leading cities and urban areas have thus disappeared totally or as separate entities in the last several decades.

7. Expressed in statistical form, in 1981 there were 1,539 general circulation daily newspapers in the United States (Hearst 53). Out of this large total there are only 31 cities of all sizes, possibly now only 30 (see Hearst Prop. Find, p. 11, although this is an assertion only not evidence), with more than one fully competitive newspaper, about 2 per cent of general circulation dailies. In cities with a population between 500,000 and 1,000,000, all of which had competitive newspapers in 1948, only half have independent and competitive newspapers today (Prof. Rosse, Tr. 490-92; Hearst 54).

8. Although the gross number of cities with newspapers increased from 1923 to 1981, from 1297 to 1539, the number of cities having more than one newspaper declined from 502 to 30 or 31 (Hearst 53). Expressed in percentages the number of U.S. cities with more than one newspaper declined from 38.7 per cent to 2 per cent (Prof. Rosse, Tr. 481-89; Hearst 51, 53).

9. It is apparent that the financial troubles of metropolitan daily newspapers stem from a combination of causes. Foremost among these has probably been the rise of television and

its pervasive presence (Prof. Rosse, Tr. 511; Morton, Tr. 185). Large numbers of people now get their news from television, not the daily newspaper. Further, television is a formidable competitor for the advertising dollars which metropolitan newspapers must have for their survival. The growth of suburban areas and the location in those areas of large portions of the population with significant buying power, which historically has constituted a most important class of newspaper readers and subscribers, has drastically increased newspaper distribution and delivery costs. Further, this shift of population has brought about or contributed to a movement of business and economic activity into outlying areas leading to the growth of suburban papers which, like television, compete for the advertising revenue needed by metropolitan dailies and also compete for circulation with those dailies. The rising standard of living in this country since WW II, furthermore, particularly during the past two decades has changed the way people live. The tremendous mobility due to automobiles and the proliferation of recreational activities, combined with television, has radically cut into the time large numbers of people are willing to devote to reading daily newspapers. Today there is intense rivalry for the leisure time of the public. Newspapers, which once had a secure claim on much of the public's leisure time, have failed to maintain their position and have suffered absolute or relative circulation declines (see Morton, Tr. 185-96).

10. Coupled with absolute or relative circulation losses leading to loss of revenue, especially advertising revenue, newspapers have faced ever escalating costs. In the opinion of Prof. Rosse this factor, after television, has been the principal cause of newspaper problems, especially in the last decade (Tr. 511). This escalation has produced for many newspapers the not unfamiliar problem of revenue failing to keep pace with costs.

Economic Factors Bearing on Newspaper Operation

11. A number of economic factors bearing on metropolitan newspaper operations in general, apply to the Seattle area and to the operations of the Post-Intelligencer and the Seattle Times. Critical to an understanding of a metropolitan newspaper operation is the relation of circulation and advertising revenue. They are interdependent. The most important source of newspaper revenue is advertising. The marketability of a newspaper's advertising space and what can be charged for it is directly dependent upon circulation, with particular emphasis upon penetration of the households in the market (Morton, Tr. 224-27, 239-40; Pennington, Tr. 2265-74). The desirability and popularity of a newspaper is directly related to the advertising it carries. People subscribe to and buy the newspaper with the largest advertising volume (Prof. Rosse, Tr. 538-48; Morton, Tr. 204; (Hearst 61). Mr. Morton stated the interrelation in this fashion (Tr. 204):

> . . . they depend on one another. Basically, advertising grows out of circulation volume. A decline or a lack of circulation generally brings a resulting decline and lack of advertising. Advertising has an appeal to readers, and also to other advertisers. They tend to want to advertise where everybody else is advertising. So the less advertising you have, the less appealing you tend to be to readers, which tends to mean that you get less circulation. And so it's kind of a vicious circle in which the less advertising you get, the less circulation you get, the less advertising you get. And it basically causes a newspaper to, over time, to gradually go down in both of those things.

12. Advertising is the most important source of revenue for a newspaper (Hearst 79; GE 12A—Antitrust Division Exhibits are marked "GE" for "Government Exhibit"). Advertising falls into three general categories, retail, classified, and national. Retail consists of advertising by department stores, supermarket chains, local merchants, restaurants, entertainment places, service busineses, and the like. Classified is self-evident, the most important categories being employment and real estate. National consists of advertising of brand-name

products marketed throughout the country or at least regionally. By dollars generated the rank is retail, classified and national.

13. Following advertising, circulation is the most important source of revenue for metropolitan daily newspapers. Due to rising newsprint, delivery and other costs, circulation revenue today often is only sufficient to pay the physical cost of the newspaper, i.e., newsprint, ink, printing, and the distribution costs of placing it in the hands of the purchaser. In some cases circulation revenue is not even sufficient to pay these costs. Reportorial and editorial costs, including features, wire services, and similar items, plant, equipment, management, clerical, and, in general, all other costs must be defrayed by advertising revenue (Fassio, Tr. 75-76; Hearst 79B-D). The ability of metropolitan daily newspapers such as the Post-Intelligencer to increase revenue substantially by charging more for their newspapers is highly limited (Prof. Rosse, Tr. 538-42; Hearst 61; Fassio, Tr. 950-54).

14. As indicated, what a newspaper can charge for advertising is dependent upon its circulation, the most important aspect being the number of copies delivered to households through paid subscriptions. A decrease in circulation causes a decrease in what can be charged per line of advertising. Conversely, as a metropolitan daily increases its paid circulation, the charge it can make per line rises (Prof. Rosse, Tr. 544-50; Hearst 62).

15. In the past decade the cost of publishing a newspaper has increased heavily as it has in many industries. However, in the newspaper field two key elements have increased far beyond the general inflation experienced in the 1970's (Hearst 60). These elements are newsprint and gasoline. Increases in newsprint have hit metropolitan daily newspapers particularly hard, and increases in the price of gasoline have disadvantaged metropolitan newspapers with widespread delivery areas (Prof. Rosse, Tr. 524-30, 593-94, 644; Morton, Tr. 220; Stone, Tr. 1923-26). Newsprint is now 259.6 per cent of what it cost in

1970 based on constant dollars, and gasoline has increased 355.5 per cent (Prof. Rosse, Tr. 524-29; Hearst 60).

16. Economies of scale are most important in the newspaper industry. Economies of scale have a sharp bearing upon the ability of a metropolitan daily newspaper to survive in the face of rising costs and competition from rival newspapers and other media. The cost per newspaper copy is directly related to the number of copies produced (sold). In other words, the greater the circulation, the lower the cost of producing a copy of the newspaper. This is not a novel concept but it has special applicability in the newspaper field because once the content of a newspaper (reportorial, editorial, advertising) is created, it does not have to be recreated for each copy produced (Prof. Rosse, Tr. 578). Additionally, the cost per page declines as the number of pages produced increases (Prof. Rosse, Tr. 562-71; Hearst 65F).

17. The significance of economies of scale applicable to metropolitan daily newspapers is that the daily with the lowest circulation and fewest pages has the highest costs, and the dominant newspaper with the largest circulation and the largest number of pages has the lowest costs. That the daily with the largest circulation will also have the most pages derives from the fact, already set out, that advertising and circulation are interdependent, the daily with the largest circulation will attract the most advertising (Prof. Rosse, Tr. 538-50; Morton, Tr. 204, Hearst 62).

18. When economies of scale are combined with the fact that both volume of advertising and the charge that can be made for each line of advertising decline as circulation declines, the drastic impact on metropolitan daily newspapers losing the competitive struggle for circulation is readily apparent. This is the genesis of the "downward spiral" referred to in this proceeding and in the legislative history of the Act (see, e.g., Sen. Inouye, Cong. Rec., Jan. 29, 1970, p. 1785; Prof. Rosse, Tr. 550, 640-41; Morton, Tr. 275-77). A newspaper in probable danger of financial failure exhibits, among other characteris-

tics, the following: a downward trend in circulation over a sigifnicant period of time, a decline in the volume of advertising carried over time, a concomitant decline in the charge which can be made for advertising on a per line basis, an increasing ratio of news and features to advertising linage (because of the decline in the volume of advertising carried), a decreasing income relative to costs, and consistent financial losses reflected in profit and loss statements. When these factors persist over time and reach a certain level, as discussed later, the decline is probably irreversible (Morton, Tr. 275-77; Prof. Rosse, Tr. 648-50).

The Seattle Metropolitan Area

19. The national trends affecting newspapers and the economic forces operating upon them nationwide apply in the Seattle area as they do elsewhere in the country (Prof. Rosse, Tr. 597).

20. The Seattle metropolitan area extends from Everett south along the eastern shore of Puget Sound through Seattle proper, through southern suburban and industrial areas to include Takoma *[sic]*. East of Seattle are a series of heavily populated suburban communities. The population of this area is currently 1,508,432, and it is the 25th largest urban center in the United States (Hearst 52C). Seattle itself has a population of 480,832, and as a city proper is 24th largest (Hearst 52B). Although the city itself is not growing, surburban and outlying areas are (GE 21d), and the greater Seattle area has had a much better than average growth rate for major urban centers. In fact, the metropolitan Seattle area was the third fastest growing of the leading Standard Metropolitan Statistical Areas in the country between 1979 and 1981 (Morton, Tr. 372; Int. 166). The greater Seattle area will probably outperform national averages in population growth in future years (Morton, Tr. 298, 321). Seattle is the 22nd largest in number of households, an important factor in supporting newspapers (Int. 249A; Prof. Rosse, Tr. 787). In terms of effective buying income Seattle ranks 21st in the nation. All things considered it

is a vital, growing part of the country (Morton, Tr. 372; Fassio, Tr. 1455-56). Although there has been heavy suburban growth, Seattle is somewhat unique in that the central city remains economically viable and undecayed (Prof. Rosse, Tr. 614-16; Morton, Tr. 220, 226).

21. The Post-Intelligencer and the Seattle Times, as stated, are the dominant metropolitan newspapers in the city of Seattle and environs. Everett on the north has a major daily, the Everett Herald, recently acquired by the Washington Post, which has begun publication of a Sunday edition. The daily circulation of the Everett Herald is around 60,818. To the south, the city of Takoma *[sic]* supports a major newspaper, the Takoma *[sic]* News Tribune, with a daily circulation of around 106,120 which also publishes a Sunday newspaper (Hearst 67B and C).

22. In addition to these newspapers, suburban communities near Seattle contain a number of smaller daily newspapers. Among these are the Auburn Daily Globe News with a circulation of 10,213 and a Sunday edition, the Bellevue Journal-American with a daily circulation of 27,558, the Bremerton Sun with a daily circulation of 35,927, the Kent Daily News Journal with a circulation of 13,486 and a Sunday edition, the Renton Daily Record Chronicle with a circulation of 14,888 and a Sunday edition. Somewhat farther away there are dailies in Olympia, Centralia-Chehalis, Skagit County and Port Angeles (Hearst 67B). In addition, there are many weekly newspapers (Hearst 67D through F).

23. Seattle, of course, has its share of other media including television stations, radio stations, national and local magazines and periodicals, journals of national circulation, and the like.

The Post-Intelligencer

Decline in Circulation

24. The net paid circulation, Monday through Saturday, of the Post-Intelligencer declined from 1961 to the year ending

March 31, 1981 from 213,171 to 182,475. This represented a decrease in circulation of 14.3 per cent during the same period as the Seattle metropolitan area was increasing in population from 1,107,213 to approximately 1,508,432, about 44 percent (Hearst 72C, 80B, 52C; GE 21d).

25. Although during this 20-year period the downward trend in circulation of the Post-Intelligencer from time to time seemed to be reversing, circulation later fell back and the declining trend continued. Thus, from an average Monday through Saturday figure of 194,732 in 1964, circulation increased each year through 1968 when it reached an average of 204,726, lower than 1961 but significantly higher than 1964. From this figure, however, the decline again set in and the downward trend continued until 1972 when average Monday through Saturday circulation reached the lowest point since 1961 of 180,212. Again an upward period began through 1974 when 195,707 Monday through Saturday was reached. This did not last and by 1977 average weekly circulation had fallen to 179,703, an all-time low. Another upward movement then occurred reaching a level of 191,957 in 1980 which then fell back through March 31, 1981 to 182,475 (Hearst 72C). See generally Stone, Tr. 1900-07; Hearst 80-84.

26. For the first nine months of 1981 through September, the Monday through Saturday circulation of the Post-Intelligencer has been 180,618 (Hearst 101). In October through November 19, however, there has been yet another increase in Monday through Saturday circulation to about 191,250 (Perona, Tr. 3115). To some extent the upward and downward movements, despite the overall trend down, may have reflected the general business cycles in Seattle (Stone, Tr. 1902).

27. The Post-Intelligencer's circulation may be viewed as being in three general areas, the City Zone which is essentially the metropolitan area of Seattle, the Retail Trade Zone which is the outlying area around Seattle, and a third zone or area in northwest Washington beyond the foregoing Retail Trade Zone, sometimes referred to as "Other Areas" or "All Other Zones" (Hearst 66A; see also Hearst 59A-C). The most impor-

tant area of circulation, of course, is the City Zone. The circulation of the Post-Intelligencer differs somewhat from that of the Seattle Times in that the former has a greater proportion of its circulation beyond the City Zone and the Retail Trade Zone than the latter (Hearst 69C, 70C, 71C). Monday through Saturday the Post-Intelligencer in 1981 had 108,691 in the City Zone (Hearst 69C), 35,451 in the Retail Trade Zone (Hearst 70C), and 38,333 in "All Other Zones" (Hearst 71C).

28. According to these figures 40 per cent of the Post-Intelligencer's weekday circulation was outside the City Zone. Sunday circulation figures were not greatly different, 111,756 in the City Zone, 53,613 in the Retail Trade Zone, and 47,856 in "All Other Zones." For Sunday, 47 per cent of the Post-Intelligencer's circulation was outside the City Zone.

29. For the Seattle Times weekday circulation was 195,130 in the City Zone, 52,867 in the Retail Trade Zone and 9,135 in "All Other Zones) *[sic]*, 24 per cent being outside the City Zone. For Sunday, the Times had 234,400 in the City Zone, 84,659 in the Retail Trade Zone, and 24,242 in "All Other Zones," 31 per cent being outside the City Zone. These figures are of some importance because as gasoline costs have escalated, the larger proportion of the Post-Intelligencer's circulation in outlying areas beyond the City Zone area has caused its delivery costs to rise proportionately more than those of the Seattle Times (Prof. Rosse, Tr. 582-89, 645; Morton, Tr. 219-20).

30. In the City Zone, the Post-Intelligencer's circulation, Monday through Saturday, has fallen from 136,161 in 1961 to 108,691 for the year ending March 31, 1981, a decline of about 20 per cent. As in the case of the Post-Intelligencer's overall circulation, there were peaks and valleys in the declining twenty-year trend. Monday through Saturday City Zone circulation fell each year from the foregoing 1961 figure to 123,482 in 1964 when an upturn occurred each year for the next four years to reach 135,362 in 1968, whereupon the decline set in again, weekly through Saturday, falling to a low of 113,613, in 1972. The next two years, 1973 and 1974, witnessed a modest

increase to 120,668, which was again reversed to reach another all-time low of 110,331 in 1977. Circulation in the City Zone increased from 1977 through 1979 to 115,181, but declined again by 1981 to a twenty-year low of 108,691 (Hearst 69C).

31. The pattern of the Post-Intelligencer's Sunday circulation basically has been similar to that of its Monday through Saturday circulation. With peaks and valleys the trend, nevertheless, has been steadily downward for the last twenty years, falling from 248,778 in 1961 to 213,225 through March 31, 1981, a decline of about 14 per cent (Hearst 72D). Sunday circulation by September 30, 1981, was 212,167, an all-time low (Int. 311). As in the case of Monday through Saturday circulation, Sunday Post-Intelligencer circulation declined by 14 per cent during a period when the metropolitan Seattle area population grew by 44 per cent (GE 21).

32. The decline in circulation of the Post-Intelligencer cannot be viewed in isolation, but must be considered in context with what was happening to the Seattle Times, the Post-Intelligencer's main competitor. While the Post-Intelligencer was experiencing steady erosion of its weekly and Sunday circulation, the Seattle Times was consistently gaining in circulation. From a Monday through Saturday circulation of 224,553 in 1961, only moderately ahead of the Post-Intelligencer by about 11,382 or 5 per cent, the Seattle Times grew to 257,132, while the Post-Intelligencer declined to 182,475, increasing its lead over the Post-Intelligencer to 41 per cent. By March 31, 1981, the Times had increased its circulation by 32,579, and had increased its Monday through Saturday lead over the Post-Intelligencer to 74,657. In other words, as the Post-Intelligencer fell in circulation by about 30,696 copies from 1961 to 1981, the Seattle Times gained approximately a corresponding amount (Hearst 72C; see also 72A).

33. The Sunday circulation shows an even more dramatic shift away from the Post-Intelligencer and to the Seattle Times. As of March 31, 1981, Sunday circulation of the Post-In-

telligencer was 213,225 and that of the Seattle Times was 343,301. As the Post-Intelligencer lost Sunday circulation of 35,553 from 1961 to 1981, the Seattle Times increased its Sunday circulation by 86,818. The disparity in the Sunday circulation of the two papers is now severe, the Seattle Times being ahead by 130,076 copies, a lead about 61 per cent over the Post-Intelligencer (Hearst 72D, 72B). The share of total Sunday circulation has shifted from an approximately even split in 1961 to the foregoing heavy lead for the Seattle Times. The current share of total Sunday circulation in all areas is 38.31 per cent for the Post-Intelligencer to 61.69 for the Times. The declining trend of the Post-Intelligencer's Sunday circulation has been acute in the last several years, indicating accelerating losses vis-a-vis the Times (see Hearst 81A(2) and Stone, Tr. 1907).

34. Sunday circulation is especially important in the competitive struggle between metropolitan daily newspapers. Reading the Sunday newspaper with its features, supplements and comics has become an institution in American households. The Sunday newspaper has become bulky and filled with supplements, and local retail classified and national advertising. For the newspaper, its Sunday edition can be a lucrative source of advertising revenue, and a popular Sunday edition can be a most important factor in selling subscriptions and boosting weekday circulation (Prof. Rosse, Tr. 623; Morton, Tr. 215-16).

35. A variety of charts and graphs in the record depict the losing struggle of the Post-Intelligencer against the Seattle Times (Hearst 69A-E, 70A-E, 71A-E, 72A-E). In the City Zone, in 1961 the Monday through Saturday circulation of the Post-Intelligencer was 136,161 and that of the Seattle Times was 179,223, the Times' lead being 43,062. By 1981, the disparity had grown to 86,439, the Post-Intelligencer's circulation being 108,691 as contrasted to the Times' 195,130. In 1981 the Seattle Times had 64.23 per cent of the two metropolitan dailies' combined City Zone Monday through Saturday circulation and the Post-Intelligencer 35.77 per cent. The ratios in

1961 were 56.83 per cent for the Times and 43.17 for the Post-Intelligencer (Hearst 69C 69A).

36. City Zone circulation is important for the Post-Intelligencer because advertisers are particularly interested in this area of circulation. Additionally, delivery costs are less in the City Zone than in outlying areas, as already noted. The Post-Intelligencer suffers some disadvantage in this area, furthermore, aside from its much lower circulation than the Seattle Times, because it has a much higher proportion of single-copy sales, 32 per cent as compared to the Times' 20 per cent. Advertisers are more interested in home delivery circulation than in sales from newstands or dispensing machines, because a newspaper delivered to the home is more often used as a shopping guide and is frequently read by a number of people (Morton, Tr. 239-40).

37. In the so-called Retail Trade Zone (Hearst 66A), the circulation of the Times, Monday through Saturday, grew from 35,932 in 1961 to 52,867 for the year ending March 31, 1981, an increase of about 47 per cent. While this gain was taking place for the Times, the Post-Intelligencer's circulation in this area remained static, in fact, decreasing by several hundred copies (Hearst 70C, 70A). As noted earlier, during this period while the Post-Intelligencer's circulation in the Retail Trade Zone remained relatively static, and that of the Times grew substantially, the population of the Retail Trade Zone also grew substantially.

38. The situation was even worse for the Post-Intelligencer in City Zone Sunday circulation. From a split of 39.92 per cent of combined circulation for the Post-Intelligencer and 60.08 per cent for the Seattle Times in 1961, 119,554 to 179,929, the position of the Post-Intelligencer had deteriorated by 1981 to 32.28 per cent as opposed to 67.72 per cent for the Times, 111,756 to 234,400 (Hearst 69B, 69D).

39. In the outlying areas in counties around Seattle, the Retail Trade Zone, where the Post-Intelligencer and the Seattle Times had about equal circulation for their Sunday editions

in 1961, 51,768 to 51,474, by the year ending March 31, 1981, the Times had gained 33,185, 64 per cent, whereas the Post-Intelligencer had remained approximately static. By March 31, 1981, the Post-Intelligencer's share of combined Sunday circulation in these areas had fallen to 38.77 per cent and the Seattle Times had risen to 61.23 per cent (Hearst 70D, 70B).

40. In the other areas beyond the City Zone and the Retail Trade Zone, the Post-Intelligencer has had a much higher circulation than the Seattle Times, 41,270 to 9,398 in 1961. This remained fairly constant through March 31, 1981, the Post-Intelligencer declining by 2,937 to 38,333 and the Times losing 263, falling to 9,135. This is an expensive area to deliver newspapers from central Seattle because of the distances involved. Approximately 21 per cent of the Post-Intelligencer's circulation is in this area (Hearst 71C, 72C).

41. In other areas beyond the Seattle City Zone and the Retail Trade Zone, the Post-Intelligencer also lost Sunday circulation. In this area the Post-Intelligencer's Sunday circulation in 1961 dominated the Times, 77,456 to 25,080. During the period from 1961 to 1981, however, the Times held steady to its approximately 25,000 whereas the Post-Intelligencer fell by 29,600 copies from 77,456 to 47,856 (Hearst 71D, 71B). Yet, 22 per cent of the Post-Intelligencer's total Sunday circulation is in this outlying area in which, as mentioned, it is expensive to distribute and which is of lowered interest to local retail and classified advertisers (Morton, Tr. 207-09; 220-27; Stone, Tr. 1924). In contrast, the Seattle Times has only 7 per cent of its Sunday circulation in this area (Hearst, 71D, 72D).

42. Although the Post-Intelligencer's proportionately greater ciruclation in the areas beyond the City Zone and the Retail Trade Zone helps it obtain national advertising, the increased cost to distribute in these areas has had a negative impact on the Post-Intelligencer's operating results (Prof. Rosse, Tr. 632-33; Stone, Tr. 1923-25; Morton, Tr. 220).

Decline in Share of Advertising

43. Gross advertising revenues for the Post-Intelligencer and the Seattle Times for recent years have been the following:

	Post-Intelligencer	Seattle Times
1976	18,764,126	37,406,541
1977	21,048,988	44,730,032
1978	23,741,717	52,287,942
1979	26,245,380	62,224,486
1980	28,804,884	68,824,287

(Hearst 96B).

44. In 1961 the share of total combined advertising linage, retail, classified and national, in both metropolitan dailies held by the Post-Intelligencer was about 40 per cent and that of the Seattle Times was a fraction over 60 per cent (Hearst 90B). As in the case of circulation, this share of the Post-Intelligencer has moved steadily downward, with occasional minor pauses, until at the end of 1980 the Post-Intelligencer held a share of a little under 33 per cent. In fact, since 1974 the declining trend of the Post-Intelligencer has accelerated somewhat (Hearst 90A; Prof. Rosse, Tr. 635-36; Morton, Tr. 241; Hearst 87A). In contrast the Seattle Times gradually moved upward until at the close of 1980, the Times was carrying approximately 67 per cent of all the advertising linage in both papers (Hearst 90A-B).

45. Local retail advertising approximately reflects the foregoing percentages, the Post-Intelligencer declining from about 36.78 per cent in 1961 to about 32.60 per cent of total retail linage in 1980, the Times increasing in this category from about 63 per cent to 67 per cent (Hearst 91A-B). The decline in the Post-Intelligencer's share of retail advertising is important because a high volume of retail advertising tends to attract additional retail advertising, as stated earlier. Retail advertis-

ing, of course, is a major revenue source (Morton, Tr. 242-43; Hearst 86.1(A)-(B)).

46. In the area of national advertising the Post-Intelligencer has increased its share slightly in competition with the Times, from 42.20 per cent in 1961 to 44.05 per cent in 1980, a gain of about 1.85 per cent. In 1961 the share of the Times of national advertising was 57.80 per cent and in 1980 it was 55.95 per cent. During this period there have been some ups and downs, for example, in 1970 the Post-Intelligencer attained a share of national advertising linage of 44.56 per cent while in 1973 this share had slipped back to 38.24 per cent (Hearst 92A-B). This stable performance from 1961 to 1980 could be related to the influence of the Hearst Advertising Service which obtains national advertising for the Post-Intelligencer. Possibly also the greater relative circulation of the Post-Intelligencer in outlying areas has influenced national advertisers (Morton, Tr. 241-42; Prof. Rosse, Tr. 633).

47. But in the field of classified advertising the situation is radically different and to the disadvantage of the Post-Intelligencer. From a share of 43.42 per cent of total combined classified advertising linage in both papers in 1961, the Post-Intelligencer slipped by 1980 to 29.54 per cent, a decline of about 14 per cent. Again, the Seattle Times increased its share from 56.58 per cent to 70.46 per cent, a gain of almost exactly the percentage the Post-Intelligencer lost (Hearst 93A and B).

48. Classified advertising is very important to a metropolitan daily because, as in the case of local retail advertising, people frequently buy the newspaper to read the classified ads in it (Morton, Tr. 244-45). Further, since the advent of photo composition, classified advertising has become very profitable. The real estate and help wanted categories are particularly important. The Post-Intelligencer has suffered badly in these categories in competition with the Seattle Times (Hearst 94A(1) and (2); Morton, Tr. 246-48; Rosse, Tr. 638-39). The Post-Intelligencer in 1961 was already in a relatively weak

position with 36.7 per cent of total combined real estate linage advertising as opposed to the 63.3 per cent held by the Times. The disadvantage of the Post-Intelligencer worsened steadily, notwithstanding occasional slight upward movements in certain years, until 1980 when the Post-Intelligencer was publishing only about 16.3 per cent of classified real estate linage to the Times' approximate 83.7 per cent (Morton, Tr. 246-47; Prof. Rosse, Tr. 637-40; Stone, Tr. 1959-60; Hearst 94A(1), 94B). For the first six months of 1981 the Post-Intelligencer's share has fallen even lower, to 15.5 per cent (Morton, Tr. 246-47; Prof. Rosse, Tr. 637-40; Stone, Tr. 1959-60; Hearst 94A(1), 94B).

49. Real estate advertising is an especially important category because people looking for houses or other places to live are introduced to the Seattle Times because it is the main source of housing information, particularly the Sunday Times. Becoming familiar with the Times they continue to purchase it (Prof. Rosse, Tr. 637-39; Morton, Tr. 246-47).

50. The employment category has been almost as bad for the Post-Intelligencer. From a 44.3 per cent share of the combined employment classified linage carried in both metropolitan papers in 1961, the Post-Intelligencer fell to 23.6 per cent in 1980. The Seattle Times increased its lead from 55.7 per cent to 76.4 per cent. For the first six months of 1981, the share of the Post-Intelligencer has been 21.2 per cent, an all-time low (Hearst 94B, 94A(2)). Like real estate advertising, employment classified advertising is particularly important, both in attracting and holding readers, because people looking for jobs, or interested in the employment picture, will buy the paper with the most help wanted ads and will tend to continue to purchase it (Morton, Tr. 247-50; Prof. Rosse, Tr. 637-40; see Hearst 94A(2), 94B).

51. The balance of classified advertising including legal does not tell a different story. From a 43.42 per cent share in 1961, the Post-Intelligencer's linage share has declined to 29.54 per cent. The Times now has 70.46 per cent whereas in 1961 it held 56.58 per cent (Hearst 93B).

52. The share of combined total advertising revenue taken in by both papers in 1961 was 37.58 per cent for the Post-Intelligencer and 62.42 per cent for the Seattle Times. By 1980 the share of the Post-Intelligencer had shrunk to 29.50 per cent and the Seattle Times had increased to 70.50 per cent (Hearst 96B). Although gross advertising revenue increased in absolute terms during the two decades since 1961 for the Post-Intelligencer, the increase was not nearly as great as that of the Times. In constant 1961 dollars total gross advertising revenue increased for the Post-Intelligencer from $7,335,942 in 1961 to $10,500,511 in 1980 (Hearst 97C), whereas the Seattle Times increased its advertising revenue, again in constant 1961 dollars, over twofold from $12,412,762 to $25,559,001 (Hearst 98C).

53. Despite the fact that the Seattle Times has more than double the advertising revenue of the Post-Intelligencer, the latter must spend as much as the Times to obtain its much smaller share. In 1980 the Times spent $3,864,999 to obtain $68,824,287 in advertising revenue whereas the Post-Intelligencer spent almost as much, $3,678,612 to obtain $28,804,884 of advertising (Hearst 79D).

54. Comparing the first nine months of 1981 with the first nine months of 1980 and 1979, the trend for the Post-Intelligencer continues down. In retail advertising the Post-Intelligencer for the first nine months of 1981 had a 20.83 per cent share, down from the first nine months of 1980 when its share was 32.73 per cent, and from the first nine months of 1979 when the retail share of the Post-Intelligencer was 32.55 per cent (Stone, Tr. 1965). In the category of national advertising the share of the Post-Intelligencer dropped in 1981 to 42.43 per cent from 43.82 per cent in 1980 and 43.83 per cent in 1979. In classified the Post-Intelligencer had 28.27 per cent in the first nine months of 1981 as opposed to 28.96 per cent in 1980 and 30.88 per cent in 1979 (Stone, Tr. 1965).

55. Overall in total advertising the Post-Intelligencer fell to 31.43 per cent in the first nine months of 1981, from 32.58 per

cent in 1980 and 33.20 per cent in 1979 (Stone, Tr. 1966). See Hearst 105-107.

56. The per cent of advertising in the retail, classified and national categories obtained by the Post-Intelligencer and the Seattle Times fluctuate slightly from month to month (see Hearst 105-107). During the first nine months of 1981, the per cent of field held by the Post-Intelligencer was lower in national and classified in September than it was in January (Hearst 105). In retail there was a slight rise of about one-third of a per cent. Overall, the Post-Intelligencer's advertising share was lower in September than it was in January 1981 by about two-thirds of a percent (Hearst 105; see also Stone, Tr. 1963-67; Smith, Tr. 3240-41; Larsen, Tr. 3273-76). Thus, in 1981 there was a further small decline in the Post-Intelligencer's market share of advertising, and this occurred despite strenuous efforts of the Post-Intelligencer's advertising department (Cheshier, Tr. 3282-89).

57. In the newspaper industry the term "news hole" is used to signify the ratio of news, features and editorial content generally to advertising. As the amount of advertising material declines, the proportion of the paper containing non-advertising content tends to increase. In the industry a shift toward a higher volume of news, features and editorial content in relation to the amount of advertising carried is regarded a negative development, heralding or portending financial trouble (Morton, Tr. 252-65; Hartley, Tr. 3365; Hearst 49A-R).

58. Such a shift has taken place with respect to the Post-Intelligencer and a contrasting, strong positive shift has marked the operations of the Times. It should be stated parenthetically that this concept does not mean that a prosperous and financially successful newspaper with a high ratio of advertising to editorial content necessarily provides its readers with less non-advertising reading material. On the contrary, as the volume of advertising carried increases, more pages are added to the paper and the "news hole" undergoes a corresponding increase. In general, therefore, the larger the volume of advertising the larger the volume of reading mate-

rial supplied to the purchaser. This factor has a direct bearing on the success or failure of newspapers inasmuch as a higher volume of reading material attracts circulation which in turn attracts advertising. The average mix of advertising to news in the newspaper industry is 60 per cent advertising to 40 per cent news. In 1961 the ratio of advertising to news for the Post-Intelligencer was 57.43 per cent to 42.57 per cent. By 1980 this had shifted to 53.0 per cent advertising to 46.40 per cent news. For the Seattle Times a strong trend in the opposite direction has occurred. From a ratio of advertising to news of 51.17 per cent to 48.83 per cent in 1961, the Times ratio has moved to a very favorable figure of 63.57 per cent advertising to 36.43 per cent news (Hearst 95A(2), Morton, Tr. 256; Stone, Tr. 1967-74; Hearst 49A-R, 95A(1)-(2), 95B).

Losses of the Post-Intelligencer

59. The Post-Intelligencer has lost money every year beginning in 1969. According to its financial statements, the Post-Intelligencer's net losses have been as follows:

Year	Loss
1969	$ 978,818
1970	964,141
1971	822,127
1972	964,633
1973	1,385,576
1974	2,062,427
1975	1,234,419
1976	1,188,237
1977	1,391,201
1978	830,613
1979	970,675
1980	1,534,623

(Hearst 2F, 77). Cumulative losses since 1969 total $14,327,490.

60. The projected loss for 1981 based upon actual operating results through the end of September is $2,663,120, the worst loss for the Post-Intelligencer ever in gross dollars and the worst since 1974 in constant 1961 dollars (Hearst 32A, 44A). During this period the Seattle Times has been consistently profitable (Hearst 77C, 79B-D), and in 1981 appears to be experiencing its best year to date anticipating a profit of around $5,400,000 (Pennington, Tr. 2296-97).

61. Comparative summarized income statements are in the record for both newspapers (Hearst 79B-D). The data for 1980 are not untypical and, as stated earlier, show operating revenues for the Post-Intelligencer of $39,987,872, consisting of advertising revenue of $28,513,670, circulation revenue of $10,904,972, and miscellaneous income of $569,230. Expenses totalled $41,510,673 producing the loss from operations of $1,522,801. Other charges of $11,822 raised this figure to $1,534,623 stated in the preceding finding. Major expenses were the circulation and distribution cost of $9,896,743, newsprint and ink $10,151,826, advertising and editorial expense $8,451,339, mechanical $4,495,759, supplements purchased $652,264 and various other $8,223,568 (Hearst 2F, 79D).

62. The cost of newsprint and ink in 1980 almost equalled the revenue obtained from circulation, amounting to 92 per cent thereof. In 1961 newsprint and ink constituted about 71 per cent of circulation revenue (Hearst 79B, D). See also Hearst 24 through 32, and 44 for 1981 data, and Hearst 4 through 23 for the years 1960-61 through 1980.

63. The last several months of 1980 showed a $180,000 profit for the Post-Intelligencer which Intervenors point to as meaningful (Int. Prop. Find. VI, p. 40 and Memo. VI, p. 86). In view of the loss for 1980 of $1,534,623 (Hearst 2F), the record loss in 1981 of about $2,663,120 (Hearst 44A), and 13 years of losses since 1969, the "profit" at the end of 1980 is without significance (see also Fassio, Tr. 1110-13, 1534-38).

64. On the basis of the Post-Intelligencer's annual losses each year over the past 13 years, it is highly unlikely that it

could obtain financing as an independent entity (Stone, Tr. 1879, 2022-23). During the past 13 years, Hearst has advanced about $20,344,922 to the Post-Intelligencer. Had this amount been a loan or loans, the Post-Intelligencer would be $20,344,922 in debt and the Post-Intelligencer would have a negative net worth of about $11,851,154 (Hearst 100D). If interest had been charged, the theoretical debt and negative net worth would be much larger (Mitnick, Tr. 1574-75; Stone, Tr. 1878-81; see Hearst 2G).

Transactions Between Hearst and the Post-Intelligencer

The Hearst Headline Service assessment, the Editorial Management Assessment, the General Management Assessment, and to some degree, the charge for King Features, have been attacked as unjustified, and Intervenors maintain that these charges should be disregarded in looking at the Post-Intelligencer's profit picture (Int. Memo, VI pp. 46-47; Prop. Find. pp. 32-35).

Hearst Headline Service

65. The Hearst Headline Service, in effect, is the Washington news bureau of Hearst. The Post-Intelligencer paid $146,400 for this service in 1980, $96,000 in 1979, $90,600 in 1978 and comparable amounts in prior years (Hearst 2L, 1 DT, 4C through 13C, 14B, 15 through 23). In addition to the Hearst Headline Service, the Post-Intelligencer in 1980 purchased the news services of the Associated Press, United Press International, and the New York Times (Int. 207).

66. The Seattle Times took the following services in addition to the Associated Press and United Press International, the Knight Newspaper Service which includes the Chicago Tribune-New York Daily News syndicate, the Los Angeles Times-Washington Post, the Christian Science Monitor, the Dow Jones service, and the Field Enterprise Service which is the Sun-Times (Fassio, Tr. 1149-51). Also, the Times maintains a correspondent in Washington, D.C. (Fassio, Tr. 1152).

67. The Hearst Headline Service was attacked by the former managing editor and editor of the Post-Intelligencer as not worth its cost (Asbury, Tr. 3439). The Service was also attacked by the former executive editor as a "nuisance" (Guzzo, Tr. 2829.) The Post-Intelligencer's news editor criticized the service as transmitting only a fraction of the material that came over the AP, UPI, or NY Times wires. He believed that the Hearst service was not well adapted to the Post-Intelligencer because it was a "PM cycle wire," not good for Post-Intelligencer purposes in breaking news, and because the Hearst material concerned "things in Washington that were of no particular value or concern" to Post-Intelligencer readers (Ham, Tr. 3210-17). He also questioned the reliability of the Hearst service on some occasions and had expressed the view while working at the Post-Intelligencer that "it was not much good to us" (Tr. 3218). The service includes as a senior editor Joseph Kingsbury-Smith, a well-known journalist (Asbury, Tr. 3395-96) and Pulitzer prize winner (Fassio, Tr. 1148), Robert Thompson, former publisher and editor of the Post-Intelligencer, and six other writers including Marian Means whose columns appear in many newspapers (Tr. 1147).

68. Mr. Fassio, the publisher of the Post-Intelligencer, believed that if the paper did not have the service, it would be neccessary to maintain a correspondent in Washington, D.C., at considerable cost, possibly in the area of $75,000 to $100,000 a year (Fassio, Tr. 1152-53; see also Asbury, Tr. 3467-68). The Hearst Headline Service is connected with Hearst newspapers in Los Angeles, San Francisco, Baltimore, Boston, and other cities and is capable of funneling information between these cities and Seattle (Asbury, Tr. 3467). The Post-Intelligencer may also call upon the Hearst Headline Service for special reports on matters of interest in the Seattle area (Fassio, Tr. 1151).

69. The Hearst Headline Service is sold only to Hearst newspapers and is therefore exclusive with the Post-Intelligencer in the Pacific northwest (Tr. 1150). The service emphasizes background material and analysis (Fassio, Tr. 1147-48).

The assessment of the Post-Intelligencer for the Hearst Headline Service is based on the ratio of the paper's circulation to the total circulation of all Hearst newspapers, and according to Hearst's treasurer and controller, in most instances the costs of the service exceed the assessments and are absorbed by Hearst without reallocation to the Post-Intelligencer or the other Hearst newspapers (Mitnick, Tr. 1591).

70. The charge assessed against the Post-Intelligencer for the Hearst Headline Service was not a sham or fictitious charge or artificial bookkeeping entry. A wire service was rendered which, viewed in the most negative manner, at least had "some value" in the opinion of the Post-Intelligencer's former editor who was inclined to be critical and who was opposed to the joint operating arrangement (Asbury, Tr. 3532). The argument of Intervenors that the headline service was not a good wire service and not worth what the Post-Intelligencer was assessed for it is essentially a matter of opinion (see, e.g., Ham, Tr. 3226).

71. It is relevant to note that the Seattle Times, as stated, maintained a correspondent in Washington. The Post-Intelligencer did not maintain such a correspondent, and the Hearst Headline Service was the Post-Intelligencer's "presence in the capital" (Fassio, Tr. 1152). Had the Post-Intelligencer not taken the Hearst Headline Service, it would probably have been necessary for it to maintain a correspondent in Washington, as the Seattle Times did, to remain competitive in the Seattle market or, alternatively, to obtain coverage of the nation's capital in some manner. This would have entailed substantial expense. Further, a single correspondent would not have been able to produce the range of material produced by the Headline Service, and the Post-Intelligencer might have had to obtain supplemental material for news background and analysis at additional cost (Fassio, Tr. 1152-53; see Asbury, Tr. 3467-68).

Editorial Management Assessment

72. The Post-Intelligencer paid a yearly Editorial Management Assessment to Hearst. This amounted to $112,800 in 1980, $108,000 in 1979, $88,800 in 1978, $92,136 in 1977, and lesser amounts in earlier years (Hearst 2L, 1 DT, 4C-13C, 14B). The factors bearing on this charge are essentially similar in nature to those relating to the Hearst Headline Service. A former managing editor and executive editor criticized this editorial service and the Sunday column provided by Mr. Hearst, although this witness observed that his opinion was subjective (Guzzo, Tr. 2832).

73. The editorial department of the Hearst newspaper chain is located in New York City and is headed by William Randolph Hearst, Jr., who is editor-in-chief, heads a staff of 10 editorial writers and reporters, and who writes a column which appears weekly in the Sunday Edition of the Post-Intelligencer and other Hearst newspapers. The publisher of the Post-Intelligencer testified that Mr. Hearst had entree with high officials of many foreign governments, and often in the domestic area, and provided the Post-Intelligencer and other Hearst newspapers with background and editorial comment on many current domestic and foreign issues (Fassio, Tr. 1155-60). As a member of the Hearst group of newspapers, the Post-Intelligencer has exclusive rights to the materials generated by the Hearst editorial service. The costs of the Hearst editorial department in New York are allocated to the Post-Intelligencer based upon the ratio of its operating revenues to the total operating revenues of all the Hearst newspapers (Mitnick, Tr. 1595-96). Again, the contention that the Hearst editorial services were not worth what the Post-Intelligencer was assessed for them, as in the case of the Hearst Headline Service, is a matter of opinion. The assessment was not a sham or a fictitious charge, or artifical bookkeeping entry. The Post-Intelligencer received material of editorial value from a group of professional writers and reporters. Mr. Hearst is a Pulitzer prize winner (Fassio, Tr. 1156).

General Management Assessment

74. A third charge levied on the Post-Intelligencer by its owners, The Hearst Corporation, was a General Management Assessment. This amounted to $163,617 in 1980, $139,968 in 1979, $145,243 in 1978, and lesser amounts in prior years (Hearst 2L, 1D-T, 5-7K, 8-9J, 10-11K, 12E, 13J, and 15L). The General Management Assessment is an allocation of the expenses of the various central departments of The Hearst Corporation, including the Offices of the President, Executive Vice President, and General Manager of Newspapers, the General Promotion Department, the General Production Department, the Treasurer's Office, the Legal Department, and the central corporate Accounting Department (Mitnick, Tr. 1611-24; Fassio, Tr. 1172-73). In addition, the overhead costs of Hearst Enterprises, which is a centralized purchasing agent for newsprint for the Hearst newspapers, are included in the General Management Assessment except for those allocated to Hearst's book and magazine units (Fassio, Tr. 1169-70; Mitnick, Tr. 1607-08).

75. Half of the cost of the office of Mr. Bennack, Hearst's president, is allocated to various Hearst units like the Post-Intelligencer whose share is 4.6 per cent or 2.3 per cent of the total (Mitnick, Tr. 1617-18). The costs of the office of the general manager of newspapers are allocated to the Post-Intelligencer whose share is 4.6 per cent or 2.3 per cent of the total (Mitnick, Tr. 1617-18). The costs of the office of the general manager of newspapers are allocated to the Post-Intelligencer based on the ratio of its revenues to the total revenues of all Hearst newspapers (Mitnick, Tr. 1620). Both Mr. Bennack and Mr. Danzig, the current president and general manager of newspapers have been active in Post-Intelligencer affairs, rendering advice and management directions and suggestions. Both are former publishers of successful Hearst newspapers (Fassio, Tr. 1173-77; Mitnick, Tr. 1612-13).

76. Hearst provides a variety of administrative services to the Post-Intelligencer in the fields of taxes, legal advice,

accounting, procurement, retirement programs, insurance, employee benefits, financial planning, and similar matters. The Treasurer's Office of Hearst maintains an accounting division, a tax division, an employee benefits division, an insurance division, a financial planning division and an administrative division (Mitnick, Tr. 1615).

77. The accounting division advises the Post-Intelligencer on accounting and financial reporting matters. The tax division prepares and files the Hearst tax returns, which consolidate the operations of all of Hearst's divisions including the Post-Intelligencer and advises the paper as to the manner in which items should be handled for tax purposes. The employee benefits division handles Hearst's corporate-wide employee benefit programs, such as the Hearst retirement plan, and other pension and employee benefit programs. The insurance division handles all of the Hearst insurance programs in which the Post-Intelligencer participates. See Mitnick, Tr. 1615-22.

78. The Legal Department of Hearst headquarters works closely with the Post-Intelligencer and with local counsel and gives legal advice in specialized areas. The allocations to the Hearst units for the Legal Department are based on the amount of time spent and expense incurred on behalf of specific Hearst units (Mitnick, Tr. 1614-17; Fassio, Tr. 1181).

79. If the services covered by the General Management Assessment were not available to the Post-Intelligencer from Hearst, it would have been necessary to obtain many of them elsewhere, either from outside sources or from additional Post-Intelligencer personnel. It is quite possible that the Post-Intelligencer's costs for providing these services and functions could exceed the assessment now paid to Hearst headquarters (Mitnick, Tr. 1626; Bennack, Tr. 2137-38; Fassio, Tr. 1183). Thus, if the Post-Intelligencer did not have the services of the headquarters tax division, it would probably have had to hire outside accounting and tax counsel help (Mitnick, Tr. 1622), and without the help of the headquarters employee benefits division, there would probably have been costs for outside management and custodianship for assets of

the retirement plan (Mitnick, Tr. 1623-24; Fassio, Tr. 1179-81). In the area of insurance, the Post-Intelligencer would have had to arrange its insurance in the various fields of risk, at likely higher costs without the benefit of the Hearst Corporation's self-insurance program (Mitnick, Tr. 1622-23). Without headquarters accounting the Post-Intelligencer would have had need for outside, independent auditing at probable additional cost (Mitnick, Tr. 1624-26). Although the Post-Intelligencer did much of its own administrative work, and hired local counsel where necessary, the services provided by Hearst were essential and of value.

80. The evidence does not warrant a finding that the Editorial Management Assessments, the General Management Assessments, or the assessments for the Hearst Headline Service, were unreasonable or so lacking in value to the Post-Intelligencer that these transfers of funds to Hearst headquarters should be disregarded as expenses in evaluating the financial condition of the Post-Intelligencer and making a judgment as to whether it is "in probable danger of financial failure."

Other Services and Features

The Post-Intelligencer pays for certain other services and features provided by Hearst headquarters, King Features, Puck the Comic Weekly, Hearst Advertising Service and its Retail Representatives, and has transactions with Hearst organizations known as Hearst Enterprises and Hesco Supply Company. In addition, Cal Graphics, a Hearst printing organization, prints the Post-Intelligencer Sunday comics.

King Features

81. King Features is a Hearst syndicate which distributes comics and features to Hearst newspapers, non-Hearst newspapers, and other media (Mitnick, Tr. 1586). Among King Features subscribers are the Chicago Tribune and the Detroit Free Press (Fassio, Tr. 1143-46). It is the largest newspaper features syndicate in the United States (Fassio, Tr. 1139). The

Post-Intelligencer is assessed an annual charge for a certain number of features known as the "base rate." The Post-Intelligencer is not required to purchase specific features but cannot refuse the aggregate amount it spends for King Features below the base rate (Mitnick, Tr. 1587, 1698; Fassio, Tr. 1139-40). Since at least 1970, the base rate has been $1,580 per week (Mitnick, Tr. 1588).

82. If the Post-Intelligencer purchases features from King that in the aggregate exceed its base rate, it is charged an amount comparable to the amount King Features would charge third party newspapers of similar circulation size (Mitnick, Tr. 1590). The Post-Intelligencer enjoys territorial exclusivity with respect to features licensed to it by King and also the right of first refusal (Mitnick, Tr. 1586-87). The Post-Intelligencer considers the Seattle Times, the Everett Herald, and the Tacoma News Tribune as its competitors, and purchases some features which it does not use to keep them from these papers (Fassio, Tr. 1256).

83. In 1980 the Post-Intelligencer paid $94,430 for features from King, $12,570 above the base rate (Hearst 2L, Hearst 1DT). Since 1970 the Post-Intelligencer's purchases from King have exceeded the base rate, and have substantially exceeded it since 1977. Some Post-Intelligencer staff members considered a number of the King Features items to be poor in quality and testified that they would have preferred to drop these but ran into pressure not to do so because they were Hearst features, and because the Post-Intelligencer was paying for them (Guzzo, Tr. 2826-27; Angeloff, Tr. 3184-85). On the other hand, Mr. Asbury, former editor and managing editor, regarded the material supplied by King Features to be "excellent" and believed it important for the Post-Intelligencer to have the right of first refusal on this material (Asbury, Tr. 3463-64). The publisher of the Post-Intelligencer testified that the King Features materials was high in quality and valuable to the Post-Intelligencer (Fassio, Tr. 1142-47). If the Post-Intelligencer did not have the King Feature items to which it now subscribes it would have to replace these features by buying from other sources (Fassio, Tr. 1143).

84. Whether particular King Features items were good or mediocre is a question of editorial judgment. The fact that the Post-Intelligencer since 1977 has purchased more than the minimum amount required by Hearst is strong evidence that the material was valuable. The Post-Intelligencer editorial staff were professional journalists. If the King items were really poor in quality, it is difficult to believe that these professionals would have exceeded the minimum they were required to purchase. Further, King Features material is sold to a variety of non-Hearst newspapers indicating that the material is marketable.

Hearst Advertising Service

85. Hearst Advertising Service is the Post-Intelligencer's national advertising representative. It represents all metropolitan Hearst newspapers, with the exception of the San Francisco Examiner. Hearst Advertising Service has sales offices in New York, Chicago, Detroit, Los Angeles, San Francisco, and Philadelphia (Mitnick, Tr. 1602-03). The Post-Intelligencer pays a 7½ percent commission on national advertising that originates outside of Washington and Oregon (Mitnick, Tr. 1603; Fassio, Tr. 1164-65, 1267-68). Hearst Advertising Service represents no non-Hearst newspapers (Fassio, Tr. 1163-65; Mitnick, Tr. 1602-3; Larsen, Tr. 3259). It accounts for approximately 62 per cent of the Post-Intelligencer's national advertising linage (Larsen, Tr. 3268).

86. The commission rate of 7½ per cent is comparable to rates charged by other leading national advertising representatives. Mr. Pennington, the president of the Seattle Times, testified that about five years ago he considered changing the Times' national advertising representation, and asked for bids from four leading firms who submitted commission rates ranging from 7½ per cent to 10 per cent (Pennington, Tr. 2363-64). The Times president considered the Hearst Advertising Service to be experienced and able (Pennington, Tr. 2364). As noted earlier, in the national advertising category the Post-Intelligencer has not suffered a decrease in its market share, contra-

ry to what has happened in other categories (Hearst 92B; see 91B and 93B). The Post-Intelligencer paid the Hearst Advertising Service commissions ranging from $107,455 in 1970 to $319,520 in 1980 Hearst 2L, 1DT).

Hearst Enterprises

87. Hearst Enterprises, as noted under the findings related to the General Management Assessment, purchases newsprint for the Post-Intelligencer and the other Hearst newspapers, and bills it to them at cost (Fassio, Tr. 1169-71; Mitnick, Tr. 1607). The overhead costs are included as part of the General Management Assessment. Centralized buying of newsprint by Hearst has enabled the Post-Intelligencer to obtain a slightly lower per-ton price than available on the general market (Fassio, Tr. 926), and has on occasion helped the Post-Intelligencer obtain newsprint in times of shortage (Fassio, Tr. 1171-72). The allocation of overhead for newsprint buying in 1980 was about $22,000 (Mitnick, Tr. 1607-08).

Hesco Supply Company

88. Hesco Supply Company is a purchasing agent for Hearst newspapers for ink and other supplies, and plant equipment, computers, presses, and so forth. Hesco's charge to the Post-Intelligencer is equivalent to what the paper would have had to pay if it had purchased the items itself. Hesco buys at wholesale, and retains this discount (Mitnick, Tr. 1608-09). On occasion, the Post-Intelligencer benefits from Hesco's assistance in obtaining a lower price on items for the purchase of which the Post-Intelligencer has negotiated directly (Fassio, Tr. 1177-88).

Cal Graphics

89. The Hearst Corporation's Cal Graphics Division operates the only large comic supplement printing plant on the west coast. Cal Graphics prints comics for the Post-Intelligencer, for other Hearst newspapers on the west coast, and for a great

number of non-Hearst newspapers, including the Seattle Times. Cal Graphics was a department of Hearst's Los Angeles *Herald Examiner* Division prior to 1980. Hearst's San Francisco color plant printed the Post-Intelligencer's comics, and those for other Hearst newspapers and a number of non-Hearst newspapers until November 1976 when its operation was closed down. The rates charged to the Post-Intelligencer for Cal Graphics' services are the same as those charged to wholesalers based upon Cal Graphics' rate card. Rates charged to Hearst newspapers by the San Francisco Color Plant are established on the same rate-card basis as those charged to non-Hearst newspapers (Fassio, Tr. 1160-61; Mitnick, Tr. 1602). In 1980, the Post-Intelligencer paid $308,983 to Cal Graphics to print its comics.

Puck

90. Puck is the only firm in the United States that solicits national advertising for insertion in comic supplements. It serves Hearst newspapers as well as 145 non-Hearst newspapers (Fassio, Tr. 1168; Mitnick, Tr. 1604-05). Puck charges a 10 percent commission to the Post-Intelligencer, the same rate charged to other newspapers (Mitnick, Tr. 1604-05). In 1980, the Post-Intelligencer paid Puck $4,330 (Hearst 2L).

Retail Representatives

91. Retail Representative is a Hearst affiliate, connected with the Hearst Advertising Service, which assists the Post-Intelligencer and other Hearst and non-Hearst newspapers in obtaining retail advertising from large advertisers with local outlets but national offices elsewhere, such as Sears, Reobuck, Montgomery Ward, Penney's, etc. For such services 6.8 per cent of Retail Representatives' costs are allocated to the Post-Intelligencer. Charges assessed against the Post-Intelligencer between 1970 and 1980 ranged between $2,764 and $6,720 (Mitnick, Tr. 1605-06; Fassio, Tr. 1168; Hearst 2L, 1DT).

92. The charge paid by the Post-Intelligencer to King Features, Hearst Advertising Service, Hearst Enterprises, Hesco, Cal Graphics, Puck, and Retail Representatives were fair, reasonable, and value was received appropriate to the payment or better. None of these charges should be excluded from consideration in determinging whether the Post-Intelligencer is in probable danger of financial failure.

Treatment of Depreciation

93. Depreciation is a universally-used method in accounting to allocate systematically and rationally the cost of capital assets to periods which are benefited by the use of those assets. The Post-Intelligencer's financial statements use depreciation on a straight-line basis over estimated useful lives. There was no evidence that the depreciation amounts as reflected in the Post-Intelligencer's financial statements were not properly calculated and were not in accord with generally accepted accounting practices (Mitnick, Tr. 1560-63). Mr. Stone was asked whether depreciation should be removed in assessing the financial condition of the Post-Intelligencer (Stone, Tr. 1892A). In his opinion removing properly allocated depreciation assumed that the Post-Intelligencer could "operate in effect without a plant, building, trucks, equipment." In his opinion as an expert accountant and financial analyst to suggest seriously that an income statement should be considered whole without a charge for depreciation was "patently ludicrous" (Tr. 1892A). To adjust the Post-Intelligencer's financial statements to eliminate depreciation as an expense so as to reduce the magnitude of its annual losses from 1969 through 1981 would be unwarranted and inappropriate.

Alleged Mismanagement of the Post-Intelligencer and Failure to Invest Funds

94. Contentions have been made that the Post-Intelligencer is in its present troubled state because of mismanagement over the years by its owner, The Hearst Corporation,

and failure of Hearst to invest sufficient funds to allow the Post-Intelligencer to succeed in the competitive struggle, and to remain and become profitable (Int. Memo. and Findings, VI(C)). No evidence was produced and nothing has come to light in this proceeding indicating willful or culpable mishandling or culpable neglect of the Post-Intelligencer by The Hearst Corporation, or of anything other than honest efforts to solve its problems. It is obvious from the testimony of Post-Intelligencer and Hearst Corporation officials and from contemporaneous memoranda, letters, and other exhibits in the record, that they were distressed and anxious from the beginning over the persistent decline and losses of the Post-Intelligencer, and did everything they could in their best judgment to remedy the situation. It is also alleged that The Hearst Corporation was tight-fisted and failed to make necessary funds available for technological improvements in the Post-Intelligencer. When losses were averaging close to $1,000,000 a year in the early 1970s (Hearst 77C), it was a difficult business judgment whether the situation called for pouring more money into the paper, for cost-cutting, for both, or for other actions or combinations of actions. The record, nonetheless, discloses, as previously found, that The Hearst Corporation put $20,344,922 into the Post-Intelligencer from 1967 through 1980, a not insignificant sum (Hearst 100C).

95. It is evident from this record that The Hearst Corporation and its management have tried urgently during the past decade to return the Post-Intelligencer to profitability. Indeed, it was in their economic interest to do so. Although this proceeding is not to be turned into a trial of Hearst's management, based on "second-guessing" (armed with hindsight) of what there is no reason to believe were not good faith business and editorial judgments, some examination of that management, as well as of the allegation that Hearst starved the Post-Intelligencer of essential improvements, is appropriate to test what substance there is to the charges of the Intervenors.

96. In 1976 Virgil Fassio, who had developed an industry-wide reputation for successful handling of circulation and other problems in some of the largest newspapers in the country including the Chicago Tribune, the Detroit Free Press, and the Philadelphia Inquirer (Hearst 42) was recruited and assigned to the Post-Intelligencer as Vice-President and General Manager. In effect, Mr. Fassio was hired as a "trouble shooter," specifically with the mission of turning the Post-Intelligencer around (Tr. 873-900). Mr. Fassio was given the responsibility for the entire Post-Intelligencer operation except for the news department staff, and it was arranged that he report directly to Hearst headquarters (Tr. 898-99). Cost cutting actions were taken to eliminate unnecessary expenditures (Fassio, Tr. 923-24). Hearst management, however, was committed to maintenance of the editorial and reportorial quality of the Post-Intelligencer, and Mr. Fassio's instructions were "to trim unnecessary and imprudently incurred costs, not to cut editorial muscle" (Int. 18B).

97. Under Mr. Fassio's leadership during the next several years, technological improvements, including the new photo-type setters and film processors, were installed at a cost of $249,000 (Fassio, Tr. 1072). The process of "buying out" members of the typographic union was continued, eliminating about 48 positions and permitting the virtual automation of the Post-Intelligencer's composing room at annual wage savings of $922,000 (Fassio, Tr. 1069-72). An Atex computer system was installed at a cost of $425,000 to handle classified advertising (Tr. 1072-74), and the Post-Intelligencer was fully converted to cold type (Tr. 1075). In the summer of 1977 through a "buy out" arrangement with the stereotypers union, 20 jobs were eliminated. This cost $54,000 but resulted in estimated savings of $475,000 in annual wages. However, the elimination of the stereotype department required the purchase of an engraving plate-making system at a cost of $132,000 (Fassio, Tr. 1075). This, in turn, required changes in the Post-Intelligencer's presses which cost $162,000.

98. Another phase of the computer system was initiated and became operational in early 1980. This was an Atex editing computer system and cost an additional $425,000 (Tr. 1073). Thereafter, an Atex reporting system was installed at a cost of $336,000 (Tr. 1074). Negotiations with the Pressmen's union eliminated additional restrictive agreements relative to the manning of presses at a "buy out" cost of $181,000, but with annualized savings of $398,000 (Fassio, Tr. 1077). In 1980, through attrition for the most part, 54 positions were eliminated from various departments with annualized wage and fringe benefit savings of $1,181,000 (Fassio, Tr. 1079-81). The Post-Intelligencer now has "state-of-the-art" equipment in its composing room, engraving room, editorial department, classified department and business systems (Fassio, Tr. 4143).

99. The most competent staff personnel who could be found were recruited by Mr. Fassio, some from distant locations (Fassio, Tr. 931-42). A new advertising director was brought in from the Washington Post, and this person brought in a new advertising manager, also from the Washington Post. A new suburban circulation manager was hired from the San Francisco area, and a new marketing director was hired from the Miami Herald, and new managing editors for daily and Sunday were recruited (Fassio, Tr. 931-42).

100. Editorial changes were instituted designed to make the Post-Intelligencer more attractive and more readable. A new format for the Post-Intelligencer was planned in the late 1970s and instituted early in 1981 (Tr. 1030-34). Earlier in 1976 the Post-Intelligencer introduced its "Northwest" section on a daily basis, a weekly section called "Adventure," and in 1977 a news analyses section on the editorial page known as "The World Today" was begun (Fassio, Tr. 1045-46). And in 1979 to remain competitive with the Seattle Times, comics were increased from six to eight pages on Sunday and to a page and one-half daily (Tr. 1048). Also in 1979 a new section was inserted in the Sunday edition called "Sunday Woman" (Tr. 1045-46), although this decision has been controversial (Asbury, Tr. 3411-13). Sunday Woman was developed by Hearst for

use in San Antonio where its paper was competing with a Rupert Murdoch journal (Fassio, Tr. 1048-49). Whether it was wise to use this supplement in Seattle (see Asbury, Tr. 3411-14, 3471), that decision was an allowable editorial and business judgment. Hearst officials at headquarters and locally at the Post-Intelligencer were experienced newspapermen, and they were trying to provide a feature which would appeal to women and help the paper (Fassio, Tr. 1049—57, 1273-84). Currently Sunday Woman is marketed to 17 or 18 non-Hearst newspapers, including the Cleveland Press, the Sacramento Bee, and the Chicago Sun-Times (Mitnick, Tr. 1600; Fassio, Tr. 1051).

101. According to its publisher, during the period 1976-80 the Post-Intelligencer has received more first place journalism awards than any other newspaper in the Pacific northwest including first place awards from the Washington Press Women organization, the National Federation of Press Women, and Sigma Delta Chi, the national journalism fraternity (Fassio, 1057-60).

102. The circulation of the Post-Intelligencer, particularly its suburban distribution, has been pointed to as an area which was mishandled and neglected, and problems not addressed at an early date. Difficulties of distribution and delivery, however, are not unique to large metropolitan dailies (Prof. Rosse, Tr. 746). In fact, before Virgil Fassio came to the Post-Intelligencer he had been hired in 1972 by the Chicago Tribune to work on circulation problems. He had come to the Chicago Tribune from a previous assignment with the Knight newspaper chain (later Knight-Ridder) where, again, he had been hired to solve circulation problems at the Detroit Free Press. While with that paper he had been assigned to work on circulation problems at the Philadelphia Bulletin (Tr. 876-88).

103. Among the problems at the Post-Intelligencer was the historic use of independent distributors in suburban and outlying areas. This system has been common in the newspaper field (Fassio, Tr. 1015). Currently the Chicago-Tribune apparently continues use of the independent distributor sys-

tem to a large extent (Fassio, Tr. 4111). The disadvantage of the independent distributor system is that it prevents a newspaper from exercising full control over its circulation. In order for the Post-Intelligencer to change to an employee system, however, a solution to many problems was required, including issues with the Teamster's Union to which many independent distributors belong, other serious legal problems, and of crucial importance to the Post-Intelligencer, a potential cost of $1,200,000 to $1,500,000 (Francis, Tr. 3050). Before embarking on such a step, careful study had to be undertaken (Fassio, Tr. 1018; Francis, Tr. 3067). It was also necessary to test the independent distributor system being used by the Post-Intelligencer to determine if it could be modified and adapted to the circulation needs of the paper, and this was done (Francis, Tr. 3048-49). After this was completed and the decision made to convert suburban areas to an employee-run distribution system, negotiations with the Teamster's Union were required (Fassio, Tr. 1018). This was finally accomplished and the transition was completed by June 1980 (Tr. 1020-21; Perona, Tr. 3103).

104. Downroutes are newspaper routes without an assigned carrier. They are difficult to service and to collect for newspapers delivered. Downroutes were a serious problem for the Post-Intelligencer, particularly in 1978 and 1979 because of difficulty in those years in obtaining delivery people (Fassio, 1016-17, 1241-42). Downroutes have been greatly reduced (Fassio, Tr. 1375; Perona, Tr. 3089-90, 3136-38). Another circulation problem at the Post-Intelligencer was "no starts," failure to begin delivery to new subscribers, and non-delivery to subscribers. These problems have been addressed and sharply reduced in magnitude (Fassio, Tr. 1505; Perona, Tr. 3104-06).

105. Strong efforts were made to increase advertising revenue using various sales devices such as emphasizing the claimed greater "pass along" readership of the Post-Intelligencer, hiring of advertising agencies in Canada and Mexico, negotiating an arrangement with an organization known as

Sunday Metro to solicit advertising for the Post-Intelligencer's Sunday offset magazines, redesigning rate cards and realining sales territories, adding a special sections staff to the Advertising Department, participation in an annual Seattle Home Show, co-sponsoring sports events and activites with large retailers, co-sponsoring a camera and stereo show each year, initiating a special employment column in the classified section and numerous other advertising promotions (Fassio, Tr. 972-93).

106. Intervenors allege that mismanagement occurred in the labor relations area, particularly in the fall of 1980 when the Newspaper Guild threatened a strike against both the Seattle times and the Post-Intelligencer, and Hearst headquarters refused to break ranks with the Times and negotiate a separate agreement with the Guild. According to this allegation, a "strike against the Times but not the P-I would have provided the P-I with an important competitive advantage . . . The P-I would have had the opportunity to make permanent gains in circulation and advertising" (Int. Prop. Find. VI, 73-82).

107. It is impossible to say at this juncture whether a satisfactory separate agreement could have been negotiated with the Guild, and if so whether there would have been a strike against the Times, how long it would have lasted and whether the Post-Intelligencer would have been able to operate (see Fassio, Tr. 4141-42). Had the Times been struck and the Post-Intelligencer not, the former might well have settled quickly; indeed, had the Post-Intelligencer settled separately the Times might have done so also without a strike. In fact, there was no strike. Further, had there been a strike against the Times and none against the Post-Intelligencer, it is open to question whether the circulation and advertising gains, if such were made by the Post-Intelligencer, would have been "permanent," as Intervenors argue. The consequences of breaking ranks with the Times in dealing with the Guild, additionally, might have been adverse to the Post-Intelligencer down the road (Fassio, Tr. 1132-34). The Post-Intelligencer and Hearst headquarters made rational management

decisions in this situation which, at most, can be debated after the event. It cannot be concluded that the handling of the labor negotiations and the situation with the Guild was mismanagement.

108. Hearst and Post-Intelligencer executives have taken actions designed to make the paper successful and profitable. They appear to have used their best judgment to accomplish this end. Although the possibility that mistakes were made over the years cannot be ruled out, the management decisions by Hearst and the Post-Intelligencer appear to have been competent. Substantial sums of money have been invested.

109. Notwithstanding these measures losses in 1981 have been running at higher rate than ever before, $2,432,160 for the first 9 months through September (Hearst 32A). Although some of the witnesses in this proceeding were critical of the handling of the Post-Intelligencer, the evidence does not establish that new management would be any more successful than Hearst and current management of the Post-Intelligencer in returning it to profitability (see Morton, Tr. 276-85).

Projections for the Post-Intelligencer Through 1985

110. A five-year projection for the Post-Intelligencer for the years 1981-85 was prepared by The Hearst Corporation Treasurer and Controller for use in this proceeding (Mitnick, Tr. 1627-30, 1692). This projection was prepared on the assumption that the Post-Intelligencer would continue to operate as it has in the past as a separate entity although a division of Hearst. As in the case of all projections, assumptions were made generally based upon past experiences of the Post-Intelligencer. Daily retail advertising linage was projected to grow 2 per cent each year from 1981 (Hearst 74.1H). Based upon past ups and downs, the volume of national advertising was projected to decline by 2 per cent in 1982, remain flat in 1983, and to increase in 1984-85 (Hearst 75.1I). Due to recessionary factors, classified linage was projected to decline 10.2 per cent in 1981, increase 3 per cent a year during the next two years and then to remain flat in 1984 and 1985 (Hearst 75.1J).

Advertising *revenue*, as opposed to linage was projected to grow during the 1982-85 period by an average of 8.3 per cent (Cobb, Tr. 4058).

Based upon experience during the 1970-80 decade, when retail and classified advertising rates failed to keep pace with the Seattle inflation rate of 128 per cent, these advertising rates were projected to grow through 1985, but at a somewhat slower rate than the projected Seattle inflation rate (Hearst 75.1K).

It was assumed that the charge per line for national advertising could not continue to increase at a rate greater than the inflation rate. Accordingly, this rate was projected at the Seattle inflation rate (Hearst 75.1K).

Because of the entry into the Seattle area of an advertising service offering a mailing system which promised "total market coverage," the revenue from purchased newspaper sections, that is, pre-prints for insertion into the paper, likely to be distributed by this organization rather than the Post-Intelligencer, was projected to decline 10 per cent in 1982 and to remain flat through 1985.

Circulation revenue was projected to increase based upon an anticipated modest increase in circulation numbers, and upon increases it was assumed would be made in the subscription and single copy prices for the Post-Intelligencer (Hearst 75.1M). As the second newspaper in Seattle, inferior to the Seattle Times in circulation, the Post-Intelligencer is not in a position to make price increases for its newspaper unless the Seattle Times raises its price first.

With respect to operating expense, the projection assumes wages will be negotiated to provide for increases close to the assumed Seattle area inflation rate for the years 1981 through 1985. According to the projection the Seattle inflation rate is expected to be 10 per cent in 1981, 8.7 per cent in 1982, 7.9 per cent in 1983, 8.1 per cent in 1984, and 10.1 per cent in 1985 (Hearst 75.1P). The projection assumes wage settlement

agreements amounting to 10 per cent per year through 1985 (Hearst 75.10). Transportation, mainly gasoline costs, was projected to increase a rate of 11.3 per cent for the 1981-85 years.

Based upon contacts with newsprint suppliers, it was assumed in the five-year forecast for the Post-Intelligencer that newsprint would increase in price by 10 per cent in 1982, 8.9 per cent in 1983, 9.1 per cent in 1984, and 11.1 per cent in 1985, and that the price of ink would increase at the rate of 13 per cent, 12.9 per cent, 11.5 per cent, and 10.3 per cent through 1985 (Hearst 75.1N and Q).

The cost of supplements such as "Parade, and light, gas, heat and power, payroll taxes and other taxes, were projected to increase by 5 per cent, 11.6 per cent, FICA by 6.65 to 7.05 per cent, and state and local unemployment taxes at 1.6 per cent (Hearst 75.1R). State and the City of Seattle business and occupation taxes have been projected based on estimated revenues which is the way these taxes are computed (Hearst 75.1S).

In making the five-year projection it was assumed that employees leaving after January 13, 1981, would be replaced but that, otherwise, the work force would remain constant through 1985 (Hearst 75.1S). Finally, it was assumed that capital equipment purchases would not effectuate savings, that major press and mailroom equipment modernization would not be undertaken. Depreciation was calculated on a straight-line basis and a 15-year life, the "usual procedure for the Post-Intelligencer" (Hearst 75.1S and T).

111. Any projection is a judgment as to the future, which is obviously unknown. Although prepared for use in this litigation, the Hearst projection is consistent with the past performance and financial experience of the Post-Intelligencer. The underlying assumptions are not unreasonable. Based upon this projection the annual losses likely to be experienced by the

Post-Intelligencer, if it continues operations as before and is not closed down as was the Washington Star, are the following:

Year	Loss
1981	$2,733,000
1982	3,611,000
1983	4,402,000
1984	4,980,000
1985	5,823,000

(Hearst 75.1B, 75.1V). The 1981 loss is not really a projection because actual figures are available through September 1981, as previously noted, and these show that a loss of approximately this magnitude will occur. Some of the projected increase in losses for the years following 1981 is due to the assumed inflation rates built into the projection (see, e.g., Hearst 75.1P).

112. The five-year projection of Mr. Mitnick was subjected to scrutiny by Marvin Stone, an expert certified public accountant, discussed later herein, and his staff at Coopers & Lybrand, a very large firm of certified public accountants, who tested the assumptions underlying the projection by various means including regression analysis (Stone, Tr. 2023-43). Mr. Stone's study did not uncover any flaws in the five-year projection, anticipating the following range of losses for the Post-Intelligencer:

Year	Range of Losses
1981	$2,200,000 to 2,700,000
1982	2,700,000 to 3,400,000
1983	3,000,000 to 3,900,000
1984	3,800,000 to 4,900,000
1985	5,600,000 to 6,900,000

(Tr. 2040-41).

113. Using Mr. Mitnick's projections and assumptions except for advertising revenue, and excluding Hearst Headline, Editorial and General Management assessments, Mr. Sheehan, Intervenors certified public accountant, prepared an exhibit which projects a return to profitability by the Post-Intelligencer by 1984 (Int. 333 and 338). One of the key elements in this projection is the assumption that the Post-Intelligencer's advertising revenue will increase 13.47 per cent each year during the years 1982 through 1985 (Int. 339). This is not in accord with the historic performance of the Post-Intelligencer since 1969 (Hearst 144), because it selects the four best years of the Post-Intelligencer 1976 through 1979 to obtain the 13.47 per cent figure (Hearst 144). For example, in 1980 advertising revenue of the Post-Intelligencer increased by 5.4 per cent and in 1981 by 5.0 per cent, not 13.47 per cent. See Cobb, Tr. 4057-61.

114. The Hearst projection assumes advertising revenue growth averaging, as stated, 8.3 per cent for the years 1982-85 which is higher than the growth of the Post-Intelligencer's advertising revenue for any year since 1969 except the four selected by Mr. Sheehan, and higher than the 13 year average, since 1969, of 7.25 per cent (Hearst 144; see also Cobb, Tr. 4057-60).

115. It is clear from this record that over the past decade strenuous efforts have been made by the staff of the Post-Intelligencer to sell the maximum possible amount of advertising and to increase the paper's advertising revenue. Advertising revenue can be increased by selling more or by charging more per line, or both. In the face of declining circulation over the years, and established industry practices respecting the establishment of advertising rates, arbitrary increases in advertising per line rates are not feasible for the Post-Intelligencer. Advertising revenue and circulation are closely coupled, when circulation is declining the ability to sell advertising also decreases (Prof. Rosse, Tr. 640).

The sale of additional advertising space involves competitive factors essentially comparable to the sale of other products, automobiles, for example. The Post-Intelligencer must market its advertising space to local merchants, national organizations, and the public in competition with many television stations, the Seattle Times, radio, numerous suburban daily and weekly newspapers, firms with systems such as "total market coverage," and other media-types, all competing for a slice of the advertiser's budget. To project a 13.47 per cent increase each year, compounded annually, for a declining newspaper like the Post-Intelligencer and contrary to its historic experience over a 13-year period, is unrealistic. In the opinion of the law judge such a projection is unfounded and without probative value. The actual increase in advertising revenue from 1969 through 1981 for the Post-Intelligencer averaged 7.25 per cent (Hearst 144), as noted in the preceding finding.

116. In addition to projecting a return of the Post-Intelligencer to profitability on the basis, among other things, of an increase in advertising revenue of 13.47 per cent compounded annually, Intervenor's expert assumed that $1,305,037 of the Post-Intelligencer's 1981 loss of $2,663,120 (Hearst 32A, 44A)), was due to the recent recession (Sheehan, Tr. 2652). Mr. Sheehan took the early budget projection of March 16, 1981 (Int. 193), which then foresaw a loss of $1,064,083 and assumed the difference between it and the actual loss as 1981 progressed, was due to the recession. One of the fallacies in this reasoning is that operating officials are always optimistic in their budgetary projections (Cobb, Tr. 4061-62). In both 1978 and 1979, the officials at the Post-Intelligencer early in the year underestimated the losses each of those years would bring when the year was actually completed. The prediction in 1978 was a loss of $485,075 whereas the actual loss was almost twice as great, $830,613. The advance projection in 1979 was for a loss of $396,016, and when the year was over the loss in actuality was $970,675 (Cobb, Tr. 4061-62). Furthermore, to simply attribute the excess of the 1981 actual loss over the early predicted loss to the recession, without evidence necessarily

connecting these two events, is a logical non sequitur. In 1981, as noted, the Seattle Times is experiencing one of its most profitable years to date. The conclusion of Mr. Sheehan that $1,305,037 of the Post-Intelligencer's 1981 loss of $2,663,120 is due to the recession is based on a flimsy foundation, and is unreliable.

117. Furthermore, the Intervenor's projection excludes from projected income the charges now paid by the Post-Intelligencer for the Hearst Headline Service, the Editorial Management Service and the General Management Service. As previously found, these services were not sham or fictitious or artificial bookkeeping entries. The assessments were reasonable and the Post-Intelligencer received value for its money. If the Post-Intelligencer made none of the foregoing payments and received none of the services now furnished by Hearst headquarters, considerable additional expense would have had to be incurred. Whatever Intervenors may think of the foregoing services, the evidence establishes that eliminating them would necessitate considerable additional expense for the Post-Intelligencer. Because of these factors, the projection of Intervenors is not found to be a valid basis to conclude that the Post-Intelligencer is likely to return to profitability in the years 1984 and 1985, or ever. Also, there may have been a mathematical error in the Intervenor's projection (Int. 339) for 1985. See proposed findings of Hearst, page 49, number 165.

Opinions of Experts Concerning the Financial Condition and Prospects of the Post-Intelligencer

Prof. Rosse

118. Prof. James N. Rosse was called as an expert by The Hearst Corporation. Prof. Rosse has been a Professor of Economics at Stanford University, Palo Alto, California, since 1976. Since 1978 he has been Associate Dean of Humanities and Sciences. He is a Phi Beta Kappa graduate of the University of Minnesota. He received an M.A. and a Ph.D. in economics from that University in 1963 and 1966, respectively. Prof.

Rosse has taught since the 1963-65 era, has published extensively and has acted as a consultant for a number of Federal agencies including the IRS, Antitrust Division, FTC, FCC, and the Rand Corporation (Hearst 50). As an expert in economic matters, Prof. Rosse is highly qualified. His special areas are microeconomic theory and industrial organization, and within that field, newspaper economics and the economics of other communications media.

119. In Prof. Rosse's opinion the Post-Intelligencer entered a period of irreversible declines in circulation and advertising several years prior to the November 1981 hearings in this matter (Tr. 640). According to Prof. Rosse "the economic events of the 1970s seem to have pushed it over the precipice of where it can survive in competition with the Times and the other media of the area" (Tr. 641). On the central issue in this proceeding, whether the Seattle Post-Intelligencer is in probable danger of financial failure, Prof. Rosse testified (Tr. 478):

> That opinion is that the Post-Intelligencer is in danger of financial failure, that is, in the hands of a company that hadn't been willing to supply it capital at such low cost, it probably would have failed some time ago, but that the future looks very dim indeed at this point in time.

In Prof. Rosse's view the Seattle Times has attained a commanding lead in the Seattle market and "that lead appears to me to be so decisive that the Post-Intelligencer has really entered a phase where it cannot much longer survive as an effective competitor in this market" (Tr. 648). Prof. Rosse completed his testimony on direct by stating (Tr. 649):

> I think [Post-Intelligencer] is in probable danger of financial failure. I think that the choice is really not whether to [have] a JOA or not, but whether to have a JOA or a single newspaper city. I think that one of those events will happen, and happen relatively soon.

120. Because of trends in the newspaper industry, including rising costs and other factors, Prof. Rosse believed that the Seattle market will not in the long run support two newspapers

under present conditions. Were the Seattle Times and the Post-Intelligencer in closer competitive balance, the two could continue to exist, in his opinion, for some years, but not indefinitely (Tr. 661-62).

Mr. Morton

121. John Edward Morton, mentioned earlier, was called by The Hearst Corporation and was qualified as an expert based upon his study over the last decade of the newspaper industry and individual newspapers throughout the country. Mr. Morton basically is a securities analyst specializing in the newspaper industry and the opportunities offered for investment in particular newspapers or newspaper chains. His clients are large financial institutions and investment firms (Tr. 94-95). He publishes a newsletter sometimes referred to as "Morton Newspaper Newsletter" (Tr. 105). From time to time he has worked as a consultant to national publications including Fortune, Newsweek, and similar publications (Tr. 108).

122. After study of the Seattle newspaper market and the Post-Intelligencer, Mr. Morton came to the opinion that the Post-Intelligencer "is not only in probable danger of failure but had it been standing alone all these years and not had access to corporate funds from outside, it would have failed long ago" (Tr. 128). Mr. Morton described the meaning of the term "downward spiral" in the newspaper industry.

> Basically, that's a description of what happens when a newspaper starts to lose circulation, which causes it to lose advertising support, which in turn causes it to lose circulation support, and then more advertising support. In other words, the losses feed on one another. And they call it a downward spiral. It's a vicious circle that just keeps getting worse.

(Tr. 275-76).

123. In Mr. Morton's opinion based upon the long-term trends in its circulation and advertising, the Post-Intelligencer

has entered the so-called "downward spiral" (Tr. 276). From his study of the newspaper industry, Mr. Morton knew of no newspapers which had been able to reverse such a trend and return to profitability (Tr. 277). In Mr. Morton's opinion, there are two courses open to the Post-Intelligencer at this juncture, to enter a joint operating arrangement with the Seattle Times or to close-down (Tr. 283). If anyone interested in buying the Post-Intelligencer were to seek his advice, he would recommend "not to buy it" (Tr. 284).

Mr. Stone

124. Marvin Stone, a certified public accountant, was called by Hearst as an expert in the field of accounting, auditing, credit worthiness, and general financial analysis of businesses, including projections of revenues and expenses and of the question whether the Post-Intelligencer is a failing newspaper from a financial analysis point of view (Tr. 1867). In 1960 Mr. Stone established a Denver, Colorado, accounting firm which was acquired by Coopers & Lybrand in 1977. He is now a partner in that firm which is one of the eight largest accounting firms in the country, with offices in all major cities in the United States (Tr. 1846-47). Mr. Stone's qualifications are of the highest (Tr. 1848-66; Hearst 76). Mr. Stone and his organization performed an in-depth study of the Post-Intelligencer's operations, including management of the paper at the Hearst headquarters level, and including interviews with key personnel, plant tours, review of accounting practices at other newspaper chains, and other actions (Tr. 1869-73). Mr. Stone utilized three assistants and at times as many as 30 to 35 different people in his organization. In all, about 5600 hours were expended (Tr. 1872), a most extraordinary effort.

125. According to Mr. Stone the Post-Intelligencer "has been unable to sustain itself from its own resources for a dozen years or more, so it certainly is well along the way of being in probable danger of financial failure . . . The only way it has been able to support itself is because it has had a pocket from which to finance itself from other sources" (Tr. 1874). The

Post-Intelligencer has had a steady stream of financing from its owner Hearst "without any kind of interest charge" (Tr. 1878). Had interest been charged, the losses of the Post-Intelligencer would have been much greater (Tr. 1878). From the standpoint of sound accounting, in Mr. Stone's opinion, the cost of money should be apportioned to those sections of a larger firm which run as separate divisions like the Post-Intelligencer (Tr. 1892). Mr. Stone surveyed the nine largest newspaper chains, and seven of them charged each newspaper division or subsidiary interest on money advanced (Tr. 1892).

126. A cash flow analysis prepared by Mr. Stone revealed that since 1967, The Hearst Corporation was required to make up $8,493,768 cash losses by the Post-Intelligencer and to advance funds in the amount of $11,851,154 to keep it in operation, such funds being for machinery and equipment purchases, real property, furniture, auto purchases, and working capital (Stone, Tr. 2014-22; Hearst 100D). Mr. Stone began his analysis for the year 1967 because that was the first year in which Hearst found it necessary to make substantial advances of funds to the Post-Intelligencer (Stone, Tr. 2013-14). While the Post-Intelligencer was experiencing the foregoing cash losses, the Seattle Times earned $8,220,000 paid out in dividends to its stockholders (Tr. 2020-22; Hearst 100D).

127. Mr. Stone and his group studied the Post-Intelligencer in great detail, examining all aspects of its operation. Many of his findings have been mentioned or adverted to elsewhere in this recommended decision in connection with other proposed findings. In his opinion the Post-Intelligencer, rather than being in probable danger of financial failure, had already failed (Tr. 1874). He summed up his opinion in the following manner:

> The P-I has suffered deepening losses for 12 years. The trends are unmistakably bad right up through September of this year in both advertising linage and circulation, giving rise to no optimism on my part that there is anything on the horizon that will cause the losses to lessen. If anything, they seem to me that they will heighten.

> The inability of the P-I to attract advertising is the particularly greatest single reason for the problem. As we saw before, both newspapers are spending about $3-1/2 million a year and yet the P-I is just not an acceptable advertising package to the major advertisers in this area, as a result of which there is a huge deficit in advertising, and that huge deficit is widening rather than narrowing, so in every regard then I can see no reason why this has anything other than red ink in its future. Its future looks bleak indeed and the trends that are causing and have caused the losses seem to be declining rather than improving.

(Tr. 2043).

Mr. Malone

128. John R. Malone, a consultant in newspaper economics and operations, who was called as an expert by the Intervenors. Mr. Malone graduated from the University of Kansas prior to WW II with majors in economics and journalism. Subsequent to WW II he obtained a master's degree in economics from the University of Kansas. During the period when he was obtaining his master's degree he was also an instructor in economics at the University of Kansas. Mr. Malone studied at the University of Chicago as a candidate for a Ph.D. in 1950-51 and again in 1956-57. He never completed his thesis, however, or obtained a doctorate. He has worked since the 1930s from time to time as reporter, editor, part owner and official of a number of small and medium-sized newspapers. Since 1946 he has done work as a consultant for a large number of weekly and daily newspapers, including many prominent publications, such as the New York Times and the London Times.

129. Mr. Malone believed, contrary to Prof. Rosse, Mr. Morton, and Mr. Stone, that the Post-Intelligencer "can certainly survive and prosper if it continues in the morning field" (Tr. 3628). In his view past losses ($13,977,487 (1969-1980) and $2,633,120 (1981)) were "relatively small" and "manageable" "when you look at all the alternative charges in there, the Hearst organization charges, the depreciation, the various

other items of charge which there can be some control over . . . and that's a relatively small loss" (Tr. 3691). In Mr. Malone's view recent circulation gains in September, October and part of November of 1981 indicated that the past 12 years of declining circulation had been corrected (Tr. 3691-92, 3712-13). Mr. Malone was critical of the past management of the Post-Intelligencer and faulted Hearst for failing, in Mr. Malone's view, to invest sufficient capital in the paper noting that out of 36 markets west of the Mississippi, Seattle was the only locality where there had been a reduction in per cent of field by a morning newspaper (Tr. 3705, see Int. 275A). Mr. Malone was optimistic about the ability of newspapers which were behind to retrieve lost ground and become profitable, and believed the Washington Star could have done so except for bad management (Tr. 3772). He was optimistic about the prospects of the Post-Intelligencer, stating that "A little energy, a small amount of capital and a little faith in both the community and in its employees would put this paper in a tremendous position, perhaps a dominant position in the entire Northwest" (Tr. 3738, see also Tr. 3718-37). Over the years Mr. Malone has been a vigorous opponent of the Newspaper Preservation Act, of newspaper chains, and of what he considers to be "monopoly publishers" (Tr. 3895-97).

130. In litigation of this magnitude it is obvious that conflicting views of experts must be expected. Without detracting from the knowledge, sincerity and honesty of Mr. Malone, it is the finding of the undersigned law judge, based upon observation, consideration of their qualifications, study and evaluation of their testimony, and the basis and foundation for the opinions expressed, that the expert opinions and testimony of Prof. Rosse, Mr. Morton and Mr. Stone, are the more authoritative, informed and convincing as to the present condition and future prospects of the Post-Intelligencer, the factors causing its losses and problems, whether it is in probable danger of financial failure, and the other issues on which they testified relating to its past, present and future operations.

Recent Gain in Post-Intelligencer Circulation

131. In the fall of 1981 the Post-Intelligencer has experienced some circulation gains over earlier months in 1981. Circulation in September was 186,061, the highest month for 1981 (Hearst 101). Current circulation Monday through Saturday is 191,160, the average of 196,000 Monday through Friday, and 167,500 Saturday (Perona, Tr. 3115). Although this is high for 1981, the first nine months of 1981 averaged 180,618, down from 184,592, the average of the first nine months of 1980 (Heart 101). Worse, the circulation of the Post-Intelligencer is down 11,622 from the first nine months of 1979 when the Post-Intelligencer averaged 192,240 (Hearst 101).

132. Over the years the circulation of both the Post-Intelligencer and the Seattle Times has fluctuated, as found earlier herein, from year to year and from month to month both in totals and in particular zones. Despite periodic fluctuations the trend has been consistently downward for the Post-Intelligencer and upward for the Seattle Times (Hearst 69-70, 80-84). In 1979 The Post-Intelligencer oscillated between a high of 196,107 and a low of 189,396. In 1980 the range was between a high of 189,665 and a low 181,589. In 1981 through November 19, the high has been 191,167, according to Mr. Perona's oral statement (Tr. 3115), and the low has been 177,768 (Hearst 101). In each year the average has declined. Accepting Mr. Perona's figures, Monday through Saturday, of 191,160 for October and November, the average to date in 1981 is 182,536, down from 1980 and from 1979.

133. On April 1, 1981, the Seattle Times raised its home delivery subscription rate from $6.75 to $7.50 (Fassio, Tr. 957, 962). The Post-Intelligencer, fearing additional circulation losses, did not follow suit (Fassio, Tr. 950-53, 957-62). As a consequence, from April 1 through November hearings in this matter there has been a price differential favoring the Post-Intelligencer which has helped its circulation (Morton, Tr. 235). When the Times increased its price on April 1, it lost circulation (Stone, Tr. 1911-12, 1915; Morton, Tr. 234-35; Fassio, Tr. 963,

969-71, 1025-26; Perona, Tr. 3138; Whitney, Tr. 3163-64; Hearst 101, 103).

134. It is probable that the Post-Intelligencer will lose circulation when it raises its subscription price, as it will have to do at some point because of the need for revenue and constantly increasing costs (Fassio, Tr. 963-64). In fact, a price increase is scheduled for January 1982 (Fassio, Tr. 968-69; Hearst 75.1M). Based on past experience of the Post-Intelligencer and the circulation loss of the Seattle Times following its April 1, 1981, price increase, when the Post-Intelligencer raises its price it will lose possibly as much as 7 per cent of its home subscriptions, about 8,500 (Fassio, Tr. 963-64; Perona, Tr. 3138; Whitney, Tr. 3163-64). This would eliminate the fall 1981 increase in circulation, even if it were otherwise to persist.

135. In August 1981 circulation of the Seattle Times increased several thousand over the March through July figures (Hearst 103) and in September the Seattle Times gained about 8400 over its August figure. The loss attendant upon the April price increase seemingly is being recouped by the Times (Stone, Tr. 1911-15; Hearst 103, 104).

136. The gain of several thousand in circulation by the Post-Intelligencer in the fall of 1981 may well be due to the continuing price differential between it and the Seattle Times, rather than to any basic trend in the relative strengths of the two papers (see Whitney, Tr. 3163). Also, October and November circulation generally seems to rise higher than the summer months of June, July and August. At least, it did in 1979 and 1980 (Hearst 101). In any event, in view of historic circulation fluctuations and patterns over a long period of time, no conclusions can be drawn from what essentially is a fairly small recent upturn in the Post-Intelligencer's circulation. Certainly it cannot be found that this portends a reversal of its 22-year circulation decline.

Alleged Advantage of Post-Intelligencer As A Morning Newspaper

Both the Intervenors and the Antitrust Division state that morning newspapers like the Post-Intelligencer have an advantage over afternoon newspapers (Antitrust Div. Memo., pp. 30-32; Int. Memo. VI, pp. 110-12). The Antitrust Division advances this statement as an element of its argument that applicants have failed to meet their burden of proof that the Post-Intelligencer is "failing" (Memo., pp. 19-46). Intervenors advance the statement as part of their findings and argument that the Post-Intelligencer has inherent advantages, can become profitable and is not in probable danger of financial failure (Memo., VI).

137. There is evidence that on a national basis there is a "morning advantage." Trends in recent years have favored morning newspapers. On a national basis morning newspapers in the aggregate have been gaining in circulation and afternoon newspapers have been losing circulation (Morton, Tr. 378; Int. 259, 295; GE 28). This is an overall national trend but in particular metropolitan areas the situation may be different (Prof. Rosse, Tr. 663-64). There are cities where the afternoon newspaper is dominant and leads in circulation (Prof. Rosse, Tr. 664). Birmingham, Pittsburgh, Buffalo, Columbus, San Antonio, Honolulu, Scranton, Las Vegas, Chattanooga, and Trenton are examples of cities where the afternoon newspaper leads in circulation (Int. 283). Although these are not all competitive cities, that is, where two or more newspapers are under separate ownership and production, there is no necessary reason that single ownership or joint operating arrangements would keep the afternoon paper dominant if it otherwise would decline in favor of the morning paper.

138. The Post-Intelligencer claimed a "morning advantage" in pushing for advertising (Int. 203). The advertising director and the national advertising director of the Post-Intelligencer testified to their belief that the Post-Intelligencer had an advantage in being the morning paper (Smith, Tr. 3246;

Larson, Tr. 3271-72). The latter based his opinion on national trends. Prof. Rosse, however, believed that certain factors in Seattle led to a degree of uncertainty in this conclusion (Tr. 664). According to Prof. Rosse, whether there is an advantage favoring either the morning or evening paper depended upon the demographics of the city and other factors. Where the inner city has been subject to decay and population flight to the suburbs, the afternoon paper has suffered (Tr. 613-18, 664).

139. Seattle differs from many large urban centers in that its central area has not decayed and is alive, populated and viable. The middle class has not fled to the suburbs leaving a population in the inner city not attractive to advertisers (Morton, Tr. 273). These circumstances have helped the Seattle Times and, to the extent there is a morning advantage of the Post-Intelligencer, blunted its effect (Morton, Tr. 271). Mr. Morton believed the Post-Intelligencer would have been "in a lot worse shape than it is" had it not been the morning paper (Tr. 271).

140. The fact is that the Post-Intelligencer has been declining in circulation, advertising, and revenues for many, many years in competition with the Seattle Times. Since 1970, for example, the Post-Intelligencer lost 18,795 in circulation while the Seattle Times gained 13,951 (Hearst 72C). Any morning advantage accruing to the Post-Intelligencer existed during these years and plainly did not prevent the large circulation loss of the Post-Intelligencer and substantial readership shift to the Seattle Times.

141. It is also highly relevant that in February 1980 the Times became an "all day" newspaper, publishing a morning edition for single copy sale in Seattle proper and nearby areas. Home delivery in outlying areas has been changed from afternoon to morning (Morton, Tr. 239-40; Pennington, Tr. 2261-64, 2290-91).

142. Assuming there is an advantage in being a morning newspaper in Seattle, the Times will increasingly shift toward becoming a morning paper and will capitalize on this advantage

(Pennington, Tr. 2336; Morton, Tr. 239). Under the circumstances there is no basis to conclude that the fact that the Post-Intelligencer is a morning newspaper will enable it to reverse its long-term downward trend and return to profitability.

Alleged Positive Prospects for Post-Intelligencer

143. Both Intervenors and the Antitrust Division assert that the trends are positive for the Post-Intelligencer and that the outlook is bright. Such assertions are contrary to the overwhelming weight of the evidence. Minor recent circulation gains of the Post-Intelligencer have been discussed. Based upon long-term past experience it is highly unlikely that they constitute anything other than transient fluctuations which have been taking place for more than two decades. Without circulation gains there will be no advertising gains. The "morning advantage," when applied to the Post-Intelligencer, is problematical. The Seattle Times has already positioned itself to take advantage of it.

144. Two metropolitan dailies could probably exist in the greater Seattle area for the foreseeable future if they had approximately equal strength (Morton, Tr. 251, 396; Prof. Rosse, Tr. 618, 770-73), but the Post-Intelligencer and the Seattle Times do not have equal strength, and have not had equal strength for a number of years (see, e.g., Hearst 72A and B). The Post-Intelligencer has fallen so far behind, the probability is that its decline is irreversible (Morton, Tr. 277). It is true, as intervenors point out, that there are some cities smaller than Seattle where there are competing daily newspapers which are not in equilibrium (see Int. 283; Morton, Tr. 290-97). But this does not prove that the same situation can come about in Seattle. There are differences in metropolitan areas and the development of newspaper competition in such areas. What is probative with respect to the Seattle area is the long-term history of uninterrupted declines in every important category of the Post-Intelligencer's operations.

145. Although the recent recession may have hindered the Post-Intelligencer, there is little reason to believe that its current problems will end with the recession. The Post-Intelligencer has had continuous losses since 1969. In the interim there have been many prosperous years, yet the Post-Intelligencer has never had a profitable year during this 13-year period. Recessions are not unusual, they occur with regularity. To suggest that when the current recession ends the Post-Intelligencer will return to profitability is inconsistent with the realities of a thirteen-year track record. There are no recent developments of an unusual nature or any changed circumstances which present any certainty of altering the Post-Intelligencer's pattern of decline and which are likely to lead to a return to profitability when the recession ends. The Seattle Times, it may be noted, is experiencing its most profitable year ever, and the recession in Seattle must affect it also.

146. Essentially, the Intervenors and the Antitrust Division point to the "morning advantage," the correction of internal problems such as the "suburban conversion," decrease in "downroutes," allegedly more aggressive staff, recent (small) gains in circulation, assertions of former Post-Intelligencer employees that the Post-Intelligencer can succeed, criticism of past management of the paper, and the like, to justify their assertions that the Post-Intelligencer's future is "bright," that it has turned the corner and a little more time will return it to profitability, and that other newspapers have overcome declines and the Post-Intelligencer can do likewise. These Pollyanna-like assertions are not based on anything really tangible. In 1981 the Post-Intelligencer is suffering its second worse year since 1969. Losses are running at the $2,663,120 level, one million dollars more than 1980 (Hearst 77C, 44A). The optimism of the Intervenors and the Antitrust Division is founded on little more than hopeful speculation and conjecture, ungrounded in reality. Nothing has happened to justify such assertions and optimism. They lack credibility or persuasiveness in comparison with the 13 years of steady downward trend, continuing to the present, of the Post-Intelligencer in all its vital signs.

Possible Other Measures to Return Post-Intelligencer to Profitability

Additional Employee Reductions

147. The Antitrust Division contends that the Post-Intelligencer is overstaffed and can effect further employee reductions. Specifically it is said that the mailroom is overstaffed, that the composing room has 74 guaranteed positions which could be reduced to 50, and that the circulation computer system will enable a reduction of 3 or 4 positions (Prop. Find., Sect. B, pp. 45-46). It is not stated how these reductions in staff could be accomplished or whether they are possible. If there were no union contracts, no unions and no Guild, and the Post-Intelligencer management could eliminate positions at will, the assertions could possibly present an avenue for the paper to cut costs by employee reductions. The Antitrust Division in fact recognizes this difficulty (see Prop. Find., 187-189), yet it has made these assertions.

148. With respect to the mailroom the Post-Intelligencer's business manager admitted that there was overstaffing but explained that the staffing of the mailroom was regulated by a contract with the union (Cobb, Tr. 2490). Were it not for the contract the Post-Intelligencer could eliminate some positions (Tr. 2490). Indeed, the Post-Intelligencer tried to eliminate some of these positions by negotiating with the union which represents mailroom employees. These negotiations were not successful (Tr. 2490). Accordingly, this avenue to employee reductions is closed (see Fassio, Tr. 1082-85).

149. The Antitrust Division asserts that the composing room has 74 employees although the paper could get along with 50. At the same time the Division admits that these positions are "guaranteed." In other words, these 74 employees have guaranteed lifetime jobs and none of them can be taken off the job without their consent. Although the Division states that 4 or 5 of these printers with guaranteed lifetime jobs were nearing retirement age, the business manager testified "we have no guarantee of anything on people retiring or leaving." We have

had very little turnover since the job guarantees came into existence" (Tr. 2491; see also, Fassio, Tr. 1082-85).

150. Whether several positions could be eliminated in the circulation department is uncertain, there is not enough data in the record (see Cobb, Tr. 2492). Elimination of these few positions would not change the financial condition of the Post-Intelligencer significantly.

151. As a matter of fact, the Post-Intelligencer has reduced its staff considerably since 1969. Total manning has been lowered from 898 in 1969 to 721 in 1980, and the latter figure includes 71 persons hired in 1980 as a result of shifting from independent dealers in suburban areas to Post-Intelligencer employees. By buyouts and other means employment in the composing room has been reduced from 153 in 1969 to 65 in 1980 (Hearst 1IT). As this record reveals, these reductions have not returned the paper to profitability. There is no evidentiary basis to believe that significant additional employee reductions could be made, or if such were possible that they would materially lower the Post-Intelligencer's annual losses.

Wage Concessions

152. Intervenors and the Antitrust Division contend that the Post-Intelligencer's recent losses in 1980 and 1981 might have been ameliorated or eliminated had wage concessions been sought from its unions (Int. Prop. Find. VI, 84; Memo. VI., p. 64; Antitrust Div., Prop. Find. 193-198, pp. 46-47). Possibly wage concessions might be obtained from the unions, but this is by no means certain. The administrative officer of the Newspaper Guild testified at hearings that the Guild would consider a "wage moratorium" with the Post-Intelligencer, but he also testified that no wage concessions were offered when the Post-Intelligencer asked the Guild to suggest alternatives to application for a joint operating arrangement (Bruner, Tr. 2931-40).

153. Hearst did consider wage concessions from the unions, but believed that such concessions would not be enough

to extricate the Post-Intelligencer from its persistent losses (Bruner, Tr. 2932). It may be noted that the Washington Star received a wage concession from its unions (Morton, Tr. 144), yet ceased to exist in 1981. In the case of reportorial and editorial staff, wage concessions are of dubious value in many cases because talented personnel may in due time leave to secure higher pay. For others, the wage concessions tend to be temporary, with efforts to recoup occurring after a relatively short time. The publisher of the Post-Intelligencer testified on this subject:

> . . . The nobility of that gesture is short lived because people work for what is best for themselves and those who are stars or have the capability of merchandising their talents to a higher bidder will find that if that were the case with the P-I as the lower of the five in the market, I can assure you the higher bidders are out there right now. We have lost some people to the Seattle Times because they have bid higher for some of our personnel, and I would see an erosion of some very excellent personnel over a very short period of time that would further impede our progress.
>
> Secondly, those kinds of moves made, and they have been made in Washington and Cincinnati, were short lived because after a couple of years, the personnel so involved that needed to have parity with their competitors, and it becomes another wage issue that has the inevitable result of bringing wages right up to where they were before, or certainly even with the competition.

(Fassio, Tr. 1135-36). Wage concessions do not offer an avenue for extricating the Post-Intelligencer from its long-term deficit position.

Sale of Additional Pages of Advertising

154. Intervenor's certified public accountant suggested that the Post-Intelligencer could solve, or come close to solving, its financial problems by selling two additional pages of advertising each day (Sheehan, Tr. 2657-63). This is more advertising than is now purchased by the Post-Intelligencer's

largest advertising account, The Bon, a leading department store, with branches, in the Seattle area (Tr. 2717). Testimony of Post-Intelligencer management is convincing that the Advertising Department over the years has made every effort to sell as much advertising as possible. Since 1976 new advertising personnel have been hired by the Post-Intelligencer as part of a program to make its management, including its Advertising Department, as aggressive and competent as that of any of its competitors or more so (Fassio, Tr. 931-32; see Smith, Tr. 3229-47; Cheshier, Tr. 3279-94).

Despite the optimism of the Post-Intelligencer advertising personnel, there is no evidence to support a finding that in the face of severe competition from the Seattle Times, television stations, radio stations, suburban newspapers and other media, the Post-Intelligencer could sell two additional pages of advertising each day, every day continuing indefinitely into the future. This kind of contention evokes the proverb "If wishes were horses, beggars would ride."

Other Possibilities

155. Various measures open to the Post-Intelligencer as possible ways of retrieving its fortunes have been suggested. Among these are the use of zoned editions, conversion to an all-day newspaper, further improvement in the Post-Intelligencer's content, conversion to a tabloid, and advertising programs of the so-called "total market coverage" type. The evidence does not support a conclusion that any of these offer the prospect of reversing the Post-Intelligencer's losses. Zoned editions in the wide area covered by the Post-Intelligencer would be prohibitively expensive (Morton, Tr. 279-80), and it is, in any event, difficult if not impossible for a metropolitan newspaper to compete in a variety of local communities with the news coverage offered by the local newspapers (Fassio, Tr. 1115-22). In the 1960s the Post-Intelligencer published an afternoon edition called the "Red Line," in effect making it at that time an all-day newspaper. This edition cost $700,00 a year and was discontinued. According to the publisher of the

Post-Intelligencer it is not practicable or viable for the paper to enter the afternoon field (Fassio, Tr. 1123-24). Mr. Morton believed that an afternoon edition would be very costly and would only result in greater losses for the Post-Intelligencer (Tr. 280). Likewise, conversion to a tabloid offers no prospect for improving the competitive position of the Post-Intelligencer. Tabloids are not suited to the Seattle market and would contradict the traditional image of the Post-Intelligencer in Seattle and the northwest (Fassio, Tr. 1132). A "total market coverage" attempt for distributing advertising sections of the Post-Intelligencer would run into competition from organizations already in this field which cover by mail 807,000 households (Pennington, Tr. 2275-81) at a lower cost than would be possible for the Post-Intelligencer (Fassio, Tr. 1106-8, 4115).

Sale of the Post-Intelligencer

156. The position of The Hearst Corporation consistently has been, and is now, that the Post-Intelligencer is not for sale (Mitnick, Tr. 1823; Danzig, Tr. 2477; Bennack, Tr. 2211-28; Guzzo, Tr. 2836; Int. 3A, 327C; GE 55-0).

157. Despite the fact that the Post-Intelligencer is not for sale, there have been serious inquiries from time to time from apparently responsible potential buyers. Louis Guzzo, a former executive editor of the Post-Intelligencer and advisor to the former governor of Washington, Dixie Lee Ray, testified that three years ago the former owner of the Washington Star was interested in buying the Post-Intelligencer, and that he contacted the President of Hearst, Frank A. Bennack, Jr., on his behalf to determine if the paper was for sale (Guzzo, Tr. 2833-36). He was told "unequivocally it was not for sale, and as far as [Bennack] knew, it would not be" for sale (Guzzo, Tr. 2836). In 1975, the Post-Intelligencer had an inquiry from a magazine publisher in Seattle as to whether the paper was for sale. With the president of Hearst Corporation's approval he was told it was not for sale (Int. 3A, Bennack, Tr. 2217-18). In 1976 a man named Karl Eller, president of a firm called Com-

bined Communications Corporation, asked the president of Hearst if any of the Hearst newspapers were for sale, and may have specified the Post-Intelligencer along with other Hearst newspapers (Bennack, Tr. 2220-21). He was told that no Hearst papers were for sale and that the Post-Intelligencer was not for sale (Tr. 2221-22; see also Treat, Tr. 2782). John E. Cunningham, a former U.S. Representative, on behalf of a group of Northwest businessmen, has expressed an interest in the Post-Intelligencer to the extent that the group would make a "determination that if the paper were for sale, and if the parameters of that sale were established, would join in a close examination as to, in addition to providing the second newspaper, is it economically realistic" (GE 55, 56). As recently as October 29, 1981, Rupert Murdoch, owner of the New York Post and many other newspapers in the United States, Australia, and England, visited the president of Hearst and stated "that he was aware of the proceedings in Seattle [this proceeding] and that in the event Hearst was unsuccessful in getting a JOA in Seattle, that he would like to be considered in the event that Hearst decided, under the circumstances to sell the P-I" (Bennack, Tr. 2223). And on the last day of hearings, late in the afternoon, a messenger brought a letter from a Seattle industrialist to the hearing room and presented it to counsel for the Intervenors which expressed an interest in purchasing the Post-Intelligencer (Int. 355A). Although the appearance of this letter was somewhat unusual, it developed that the writer was a responsible party and that the offer "to enter into negotiations for such a purpose" was a serious one (see Offer of Proof, Tr. 4203).

158. Considering that the Post-Intelligencer is not, and has not been for sale, and that all inquiries regarding possible purchase have been rebuffed by The Hearst Corporation with statements to that effect, and that responsible prospective purchasers nevertheless continue to appear and express an interest in buying the Post-Intelligencer, it must be concluded that the Post-Intelligencer could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily.

Condition of Post-Intelligencer's Presses

159. The Post-Intelligencer's presses, although old, are adequate to produce the paper and can handle the production of a daily circulation up to around 210,000 with a daily page content of 72 to 96 and a Sunday page content of 112 (Fassio, Tr. 1187-93, 1317; Malone, Tr. 3685-87). With its current presses the Post-Intelligencer can maintain its present news and press deadlines (Fassio, Tr. 1187). With maintenance expenditures of $300,000 in repairs and modifications, there is no reason to believe that the Post-Intelligencer's presses cannot operate at their present level indefinitely (Malone, Tr. 3686, 3718-20).

Maintenance of the Post-Intelligencer As An Independent Reportorial and Editorial Voice under the Joint Operating Arrangement

160. Under the joint operating arrangement all reportorial and editorial functions of the Post-Intelligencer will be separate and independent from the Seattle Times. Business and operational functions having no connection with the Post-Intelligencer's reportorial and editorial activities will be handled by the Times. The Post-Intelligencer will control the content and nature of all advertising published by it (Hearst 1). The Post-Intelligencer will provide the Times with a written statement of its advertising policy, and the Times will conform its advertising solicitation and acceptance to this policy (Pennington, Tr. 2346-48). The Post-Intelligencer will have the same news to advertising ratio as the Seattle Times Monday through Saturday which will be greater than its current average (Fassio, Tr. 1199; Pennington, Tr. 2350; Hearst 1BQ-BS).

161. The Times will install a new Goss press which is now on order, the Times having decided that it will ultimately need this press regardless of the outcome of this proceeding. Even without this new press, the Times' production facilities are adequate, with some special measures, to handle production of both newspapers, and the combined Sunday edition (Pennington, Tr. 2284, 2333-35, 2349-51).

162. Revenues under the joint operating arrangement will be sufficient, in the opinion of Hearst officials, and insofar as the evidence can predict, to support a strong and reportorially and editorially competitive Post-Intelligencer (Bennack, Tr. 2139-40). Times management shares this opinion (Pennington, Tr. 2287). The joint operating agreement will preserve a reportorially and editorially independent Post-Intelligencer.

II. MEMORANDUM OPINION

The Newspaper Preservation Act

On July 24, 1970, the Newspaper Preservation Act became law. 15 U.S.C. § 1801-04. It provides a limited exemption from the antitrust laws for joint newspaper operating arrangements, provided the Attorney General grants approval. Section 1803(b) of the Act is pertinent in this matter. It provides:

> It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

The "policy and purpose" of the Act are contained in § 1801:

> In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

A "failing newspaper" under the Act "means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." Section 1802(5).

The issues, therefore, are (1) whether the Post-Intelligencer is in "probable danger of financial failure" regardless of, and not considering, its ownership by The Hearst Corporation, and (2), if it is in "probable danger of financial failure," whether the joint operating arrangement will preserve it as an editorially and reportorially independent newspaper and so effectuate the policy and purpose of the Act.

In determining whether the Post-Intelligencer is in probable danger of financial failure, it must be considered as if it were a free-standing entity, separate and independent. Considered as such, and based upon all the evidence and the evidentiary record as a whole, the undersigned law judge finds, as stated in the conclusions at the end hereof, that the Post-Intelligencer is in probable danger of financial failure and is a "failing newspaper" within the meaning of § 1802(5) of the Act.

Intervenors insist that probable danger of financial failure requires proof of the probable closure of the Post-Intelligencer. Likewise, the Antitrust Division, based on its contention discussed later in this section, that Hearst realizes a net benefit from operating the Post-Intelligencer and for this reason will not close the paper, asserts that "Congress did not intend to permit newspapers not in danger of closing to take advantage of the Act" (Post-Hearing Brief, p. 9).

If the Post-Intelligencer were a free standing, separate and independent newspaper, not owned by Hearst, the record in this proceeding is sufficient to prove that it would be in probable danger of closure. In view of the annual losses it has sustained since 1969, the evidence establishes that it probably could not have continued to exist. Were it not for infusions of capital from Hearst, the probabilities are that the Post-Intelligencer would have failed long ago. After years of losses it could not have obtained financing (see Stone, Tr. 1879, 2022-23). The Hearst Corporation has kept it alive. If the Post-Intelligencer is saleable today, it is because the investment of staff, equipment and plant by Hearst has maintained it as a functioning newspaper and an excellent reportorial and editorial product,

notwithstanding its substantial annual losses for 13 continuous years.

As a Hearst-owned newspaper, it is not clear what will be the fate of the Post-Intelligencer if the joint operating arrangement is disapproved (see Bennack, Tr. 2198). The Act, however, does not require Hearst to make this showing. Hearst has only the burden of proving that, apart from its ownership, the Post-Intelligencer is in "probable danger of financial failure" and is a "failing newspaper." Hearst has sustained this burden.

Alleged Requirement to Offer Post-Intelligencer for Sale

The Hearst Corporation is not required to offer the Post-Intelligencer for sale, or to demonstrate that it cannot be sold to a buyer willing and able to continue it in operation as an independent editorial voice, as a condition for approval of the joint operating arrangement with the Seattle Times. In *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), two newspapers in Tucson, Arizona, had entered into a joint operating arrangement. The Justice Department challenged this action as a violation of the Sherman Act and as an illegal merger in violation of Section 7 of the Clayton Act. The Supreme Court upheld the District Court's finding that the joint arrangement violated the antitrust laws and that neither newspaper qualified for a "failing company" defense. As applied in the Citizen Publishing case, the requirements of such a defense were that there were no prospective purchasers for the failing newspaper and that there were no alternatives to the joint operating arrangement. The Supreme Court ruled that the owner of the failing newspaper in Citizen Publishing was required to make an effort to sell the paper, turn it over to brokers, consider going into receivership, or otherwise to make a showing as to what the market for the newspaper might be. 394 U.S. at 138.

There was much critical reaction to the Citizen Publishing case. Individual congressmen condemned the case and condemned the application of the court-created failing company

doctrine as too narrow and inappropriate for newspapers in financial difficulties. See remarks of Representatives Matsunaga, Railsbeck, Annunzio and Boggs, 116 Cong. Rec. 23141, 23155, 23168, 23173 (1970), and of Senators Fannin, Inouye, and Bennett, 116 Cong. Rec. 1784-1786 (1970). The arguments, among others, were that newspapers were unique in that their staffs and reputations, which were their most important assets, deteriorated and eroded rapidly when financial failure became imminent, that the failing company doctrine had not helped the Tucson newspapers even though they had years of losses and the owner of one of them was paying "some of the costs out of his own pocket and was drawing no salary," that there was a rapid decline in a failing newspaper's value, there is "no market for independent ownership of a failing newspaper" (116 Cong. Rec. 1786, 23155).

The Senate Report echoed some of the individual congressional views already stated, commenting that the economics of the newspaper industry made it more likely for newspapers to fail when faced with competition than other businesses, and that when a newspaper is failing it is harder to reverse the process. Sen. Rep. No. 91-535, p. 4. Accordingly, the Act established a less stringent test than that applied in Citizen Publishing. The Senate Report stated (id, p. 6):

> This proposed legislation, as amended, creates a realistic definition of a failing newspaper by establishing a less stringent test than that applied in *Citizens Publishing Company* v. *United States*"

The House Report stated that the definition of the term "failing newspaper" in the Act was a departure from the doctrine as it was enunciated in the Tucson case "and the cases there cited." In other words, the requirements for the application of the failing company test as they had been worked out judicially were rendered inapplicable to newspapers which were allegedly failing and sought to enter a joint operating arrangement.

There is thus no requirement that a failing newspaper demonstrate that there are no buyers and no alternatives as a

condition for entering into a joint operating arrangement. The Hearst Corporation, in short, does not have to put the Post-Intelligencer up for sale before it can qualify as a "failing newspaper" under the Newspaper Preservation Act.

Both the Intervenors and the Antitrust Division argue that the "failing newspaper" test was derived from the standard used to test bank mergers, and that this means that the Post-Intelligencer must establish that there are no available alternatives that would enable it to survive. The basis for this argument is the reference in the Senate Report that the phrase "in danger of probable failure" [sic] is taken from the Bank Merger Act and had been the subject of a Supreme Court opinion is *U.S.* v. *Third National Bank*, 390 U.S. 171 (1968). Sen. Rep. No. 91-535, p. 2.

There is nothing in the legislative history of the Newspaper Preservation Act as a whole to suggest that Congress intended that the standards used for judging bank mergers were to be applied to newspapers. The House Report contains no reference to the Bank Merger Act or to the Third National Bank case, and the Senate Report is, in fact, mistaken. There is no definition or discussion of the phrase "in probable danger of financial failure" in the Third National Bank case. Congress established certain standards for judging bank mergers in the Bank Merger Act, and established other standards for a joint operating arrangement in the Newspaper Preservation Act.

The fact that Congress legislated certain standards and modifications to antitrust doctrine in the two industries, banks and newspapers, provides no warrant for arguing that the standards are the same, or that some of them are the same. This is obvious from the terms of the respective Acts. For example, the Bank Merger Act directs the weighing of potential anticompetitive effects of a bank merger against its probable effect in meeting the convenience and needs of the community to be served. 390 U.S. at 177. The Newspaper Preservation Act is quite different, providing that a newspaper in probable danger of financial failure can enter a joint operating

arrangement with a profitable paper if the arrangement will preserve the failing paper as an independent editorial voice. The Bank Merger Act directs the agencies and the courts to consider managerial as well as financial resources in weighing a proposed merger. 390 U.S. at 190. The Newspaper Preservation Act directs consideration of a newspaper's financial condition but makes no mention of its managerial resources. There is nothing in the legislative history to suggest that Congress intended to require the owner of a failing newspaper to sell it to others who then might enter a joint operating arrangement as permitted by the Act.

Inquiry Into Past Management of Post-Intelligencer

As indicated in the findings, the past management of the Post-Intelligencer has been attacked and allegations made that the paper was mishandled and mismanaged. Contentions in this respect have been found to be substantially unsupported by evidence which the law judge considers persuasive and credible. In any event, bad or inept management does not disqualify a failing newspaper from entering a joint operating arrangement. Nothing willful or intentional was done to damage the paper, nor was anything done or not done in operating the Post-Intelligencer which could be considered culpably negligent management. On the contrary, as the findings disclose, Hearst and the Post-Intelligencer management appear to have done what in their best judgment was feasible to stem the Post-Intelligencer's decline and to return it to profitability. These efforts have simply not been successful.

Effect of Joint Operating Arrangement on Competing Suburban Newspaper and Possible Inhibition of New Entry

During prehearing procedures Intervenors sought discovery relating to the alleged effect of the joint operating arrangement, if it were to be approved, on other media, particularly smaller suburban newspapers. Applicants opposed such discovery. On October 23, 1981, the undersigned determined to permit a limited showing of the alleged anti-competitive effects

of the joint operating arrangement on other newspapers in the Seattle area, but reserved the basic legal question for later determination.

Intervenors argue that the finding required by Section 1803(b) that approval of a proposed joint operating arrangement would "effectuate the policy and purpose" of the Act cannot be made where smaller competing newspapers "would be injured" (Int. Memo. III, pp. 14-17, Prop. Find. III, pp. 2-6). The public policy enunciated in the Act is "to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement is hereafter effected in accordance with the provisions of this chapter" (Section 1801). The issue is whether this language requires simply a determination that the joint operating arrangement will preserve a failing newspaper as an independent editorial voice, or whether it additionally requires consideration of whether other newspapers in the area may be injured or jeopardized competitively or new entry inhibited.

The terms of the Act do not favor a construction which would require an examination of the competitive effects of a joint operating arrangement on other media. The Act merely declares that legislative policy is "to preserve the publication of newspapers" and that a joint operating arrangement may be entered where not more than one is "other than a failing newspaper." Had Congress meant to attach as a contingency to a proposed joint operating arrangement that it be shown to have no anticompetitive effects on other newspapers or other media, it would have been easy to do so. Nothing in the legislative history indicates such an intention of Congress. As a matter of fact, there is language to the contrary. The House Report observed that as of 1968 out of 1500 daily newspaper cities only 45 had two or more competing dailies, and then noted that editorial competition between different publishers had been maintained in 22 cities by resort to joint operating arrangements. The Report then stated that although commercial competition may have been affected to some extent by these arrangements, they had "achieved the more important

objective of preserving separate editorial voices" (House Report No. 91-1193, p. 5). The conclusion is inescapable that there was no Congressional intention to require an inquiry into possible competitive effects from a joint operating arrangement, or to condition approval upon the absence of such effects.

Additional support for this conclusion may be found in the provisions of Section 1803(c) which addresses the question of abuse of the limited antitrust exemption granted newspapers entering a joint operating arrangement. This section specifically provides that nothing in the Newspaper Preservation Act shall exempt newspapers in a joint operating arrangement from the operation of the antitrust laws with respect to any predatory practices or any conduct which would be unlawful under any antitrust law if engaged in by a single newspaper. Newspapers in a joint operating arrangement are not exempt from any of the antitrust laws. Their conduct is subject to antitrust scrutiny to the same extent as that of any other business enterprise.

The Congressional declaration of policy in the Act to maintain a newspaper press editorially and reportorially independent and competitive refers to the failing newspaper, not to competing newspapers. The effects of the joint operating arrangement between the Post-Intelligencer and the Seattle Times, if any, on competing media are not relevant to the determination whether that arrangement should be approved under the terms of the Newspaper Preservation Act.

Incremental Analysis

The Antitrust Division insists that "Incremental Cost/Benefit Analyses" must be considered in determining whether a newspaper is "failing." Under this type of analysis the operating results of the Post-Intelligencer are examined to determine if The Hearst Corporation derives a net financial benefit from it. If the operation of the Post-Intelligencer provides a net financial benefit to its owner Hearst, the Antitrust Division maintains it will not be closed and is not, therefore, a

"failing newspaper" under the Act, and the joint operating arrangement should not be approved (Antitrust Div. Br., pp. 14-27).

This issue arose during prehearing procedures. On October 20 the undersigned granted a motion of Hearst to bar discovery and the introduction of evidence relating to tax benefits to Hearst from operating the Post-Intelligencer and incremental cost/benefit analysis. The basis for this ruling was that consideration of tax benefits and incremental analysis violated the express provisions of the Act by giving consideration to the ownership of the Post-Intelligencer in deciding whether it is "in probable danger of financial failure." The Antitrust Division filed an interlocutory appeal which was denied on November 9 while hearings were in process, although the Attorney General reserved judgment on the factual and legal issues involved. Notwithstanding the ruling, the law judge allowed the Antitrust Division to establish the factual predicate for its incremental theory by presenting, as an offer of proof, the testimony of an expert in the field, Prof. Davidson of the University of Chicago (Tr. 2532-2610).

According to Prof. Davidson the Post-Intelligencer during the years 1976 through 1980 returned a net benefit to its owner, Hearst. In 1981, however, the newspaper did not provide any benefit to Hearst, instead apparently imposing a cash drain on Hearst of about $265,000, although the Antitrust Division maintains that an accurate estimate really cannot be made for 1981 because of inadequate information (see GE 48, "Assumption C").

In calculating the benefits to Hearst, Prof. Davidson added up the tax benefits accruing to Hearst because of the Post-Intelligencer's losses, depreciation taken by the Post-Intelligencer on its building and equipment, payments made to Hearst for the Hearst Headline Service, the Editorial Management Assessment, the General Management Assessment and charges for the Hearst Advertising Service, and certain allegedly extraordinary items the Antitrust Division claims

are "one-time expenditures that provide a long-term pay back or other benefit" (Antitrust Div. Brief, p. 23). The sum of these items was then applied to the reported loss of the Post-Intelligencer, and the alleged net benefit to Hearst obtained (Antitrust Div. Br., p. 23).

In a "Counter-Offer of Proof," filed December 8, 1981, Hearst contradicts the results of the Antitrust Division's incremental analysis contending that a "complete incremental analysis for the years 1976-80 would show that Hearst received no 'net benefits' from the operations of the Post-Intelligencer" (Counter-Offer, p. 7). Hearst maintains that the incremental analysis of the Antitrust Division does not show the actual "contribution" of the Post-Intelligencer to Hearst, but only how much cash would be available to Hearst from the Post-Intelligencer's operations for capital expenditures and working capital, that a complete incremental analysis must account for additions to plant and equipment and increases in working capital, and that the actual capital expenditures and increases in working capital must be deducted from the "Net Contribution" totals on the Antitrust Division's exhibit 48C, "Assumption C" (Counter-Offer, p. 8).

The Antitrust Division's exhibit 1C (GE1C) is an internal Hearst document prepared for the information of the highest Hearst executives in connection with fall 1980 negotiations with the Seattle Times on the proposed joint operating arrangement. It supports the Hearst contention that the Post-Intelligencer did not provide a net financial benefit to Hearst. From 1967 to date this document reveals a flow of money from Hearst headquarters to the Post-Intelligencer for "Capital Expenditures." To disregard this advancement of funds to the Post-Intelligencer on technical accounting grounds is unrealistic. It is worth noting, parenthetically, that the Post-Intelligencer paid no interest on this money. Had the Post-Intelligencer been a free-standing entity, it obviously would have had to pay the prevailing rates for borrowing money, which are high. That Hearst could ever recoup the

funds advanced to the Post-Intelligencer, and spent by it for capital items is highly questionable. In consequence these funds cannot be ignored in examining transactions between the Post-Intelligencer and Hearst, including "incremental cost/benefit analysis."

The Newspaper Preservation Act, as clearly set out earlier, specifically states that the question whether or not a newspaper is "failing" is to be determined "regardless of its ownership or affiliations" (Section 1802(5)). This language was put into the Act because Congress was well aware that many newspapers are owned by chains or larger organizations. Congress intended to make certain that in deciding whether a newspaper was failing, a newspaper which was part of a larger organization was not judged differently from one which was independent, separate and unaffiliated. In debate reference was made repeatedly to the injustice and double standard which would result if one newspaper were held not to be failing because of its ownership, whereas if the same newspaper were separate and independent, a contrary conclusion might be reached (Sen. Rep. No. 91-935, Sen. Bennett, Sen. Fong, Sen. Hruska, Cong. Rec., S895, S931, S938, Jan. 30, 1970; Rep. Kastenmeier, Cong. Rec. H6484-85, July 8, 1970).

Yet this is precisely what the Antitrust Division would do in this case, using "incremental cost/benefit analysis." The Post-Intelligencer would be judged not on the basis of its own operations as a newspaper in Seattle, but on the basis of its ownership by The Hearst Corporation. In the opinion of the law judge, application of incremental cost/benefit anslysis would be a flagrant violation of the Act and the intent of Congress. The undersigned rejected application of this theory to the Post-Intelligencer and its owner Hearst in the pretrial ruling of October 20 and again rejects it in this recommended decision.

No findings of fact have been made with respect to "incremental cost/benefit analysis" because of its violation of the plan language of the Act and in consequence of the Order

denying discovery relating to this theory during pretrial proceedings (see Order of October 20, 1981).

Even if the Antitrust Division's argument based on "incremental cost/benefit analysis" were accepted, it does not necessarily follow that the Post-Intelligencer would not be shut down. Apparently under all assumptions there was no "net benefit" to Hearst in 1981, rather a cash drain (GE 48C). Further, the "net benefit" in years before 1981 was small relative to the assets of the Post-Intelligencer (GE 48C; see Duryea, Tr. 2397-99). Hearst could logically determine that it could obtain a substantially greater "net benefit" by putting the value of the assets of the Post-Intelligencer (for example, its real property) to a more lucrative use.

Tax benefits to Hearst because of the losses of the Post-Intelligencer have been considered as an aspect of the Antitrust Division's "incremental cost/benefit analysis." Consideration of tax benefits to Hearst, apart from "incremental cost/benefit analysis," would, however, be equally contrary to the statute. Were the Post-Intelligencer a separate, independent entity, there would obviously have been no tax benefits in view of its 13 years of consecutive losses. Tax benefits have meaning only, like "incremental cost/benefit anslysis," when the Act is disregarded and the ownership of the Post-Intelligencer is given consideration.

Must the Joint Operating Arrangement Be the Least Restrictive Possible

During this proceeding it has been said that the Act permits the Post-Intelligencer and the Times only to enter the least restrictive joint operating arrangement possible. As noted a number of times, the Newspaper Preservation Act provides specifically for an exemption from the antitrust laws. *America's Best Cinema Corp.* v. *Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328, 334 (D.C. Ind. 1972). Newspapers meeting the criteria of the Act can enter a joint operating arrangement providing for "any one or more" of the items enumerated by

Congress in § 1802(2), provided there is no amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined. There is no requirement that the newspapers involved construct the most limited agreement possible.

The Constitutionality of the Newspaper Preservation Act

Intervenors have questioned the constitutionality of the Newspaper Preservation Act. They raised this issue at the prehearing conference of October 30, 1981 (Tr. 21-22), at oral argument on completion of the evidentiary phase of the proceeding (Tr. 429b), and have raised it in their findings and memorandum in support (Prop. Find. IV, Memo. IV).

Intervenors state that the Post-Intelligencer and the Seattle Times are asking the Federal government for a " license" to engage in conduct otherwise unlawful under the Sherman Act. The constitutional question, Intervenors state, is whether the Federal government may issue such a "license," on the facts in this case, in light of the First Amendment. Intervenors assert that the government cannot constitutionally grant approval of the joint operating arrangement where the result would be to favor two newspaper proprietors at the expense of others and, particularly, this cannot be done through the exercise of a broad and vague delegation of discretionary power to the Attorney General who, Intervenors assert, is a politically-appointed official of the executive branch.

Federal administrative agencies are without authority to find the acts which they are delegated power to administer are unconstitutional. *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974); *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1974); *Engineer's Public Service Co.* v. *S.E.C.*, 138 F. 2d 936, 952-53 (D.C. Circ. 1943), dismissed as moot, 332 U.S. 788 (1947); *Motor and Equip. Mfrs. Ass'n.* v. *E.P.A.*, 627 F.2d 1095, 1115 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980); *Speigel, Inc.* v. *F.T.C.*, 540 F.2d 287, 294 (7th Cir. 1976); *Montana Chap. of Ass'n of Civilian Technicians* v. *Young*, 514 F.2d 1165, 1167

(9th Cir. 1975); *Buckeye Industries, Inc.* v. *Secretary of Labor*, 587 F.2d 231, 235 (5th Cir. 1979); see *Oestereich* v. *Selective Service Local Bd. 11*, 393 U.S. 233, 242 (Harlan, J., concurring) (1968); *Public Utilities Comm. of Cal.* v. *United States*, 355 U.S. 534, 539 (1957).

The Attorney General administers the Act here involved, and this is an administrative proceeding under it. It would be inappropriate for the law judge to recommend that the Attorney General find the Act unconstitutional. But in any case, that does not appear to be the state of the law.

The argument that the Newspaper Preservation Act amounts to an unconstitutional license to the Post-Intelligencer and the Seattle Times to monopolize is a greatly exaggerated statement of what is proposed or permissible under the Act. If the Post-Intelligencer is in probable danger of financial failure, the Act permits it to turn over all the business aspects of its operation to the Times provided that under this arrangement reportorial and editorial functions are kept separate and under the sole control of the Post-Intelligencer, and that the arrangement will continue the Post-Intelligencer as a separate and independent editorial voice. This is Congressional policy to permit the survival of failing newspapers. It is not a license to monopolize. In *Bay Guardian Co.* v. *Chronicle Publishing Co.*, 344 F. Supp. 1155 (N.D. Cal. 1972), the constitutionality of the Act was upheld, the Court stating on the "licensing" argument "The act pertinent to this case does not confer any license to monopolize and indeed has a specific provision prohibiting 'predatory practices' (§ 1803(c))." 334 F. Supp. at 1158.

With respect to Intervenor's equal protection argument that the Act unconstitutionally favors two newspapers at the expense of others, it is possible that some suburban newspapers may be put at a disadvantage by the joint operating arrangement (see Hartley, Tr. 3317-83; Hughes, Tr. 3966-91). But this is a possibility that Congress accepted in favor of the more important goal, in Congress' judgment, of saving editorial

voices of failing newspapers (see House Report No. 91-1193, cited earlier, p. 4). The Act, however, does not treat smaller newspapers, or suburban newspapers, unequally. Although the mainspring of the Act lay in the failure of large metropolitan dailies, it applies in its terms to all newspapers.

Nor does the Act violate the First Amendment (Int. Prop. Find. IV, Memo. IV). In *City and County of Honolulu* v. *Hawaii Newspaper Agency, Inc.*, Civil No. 79-0138 (D. Hawaii, Oct. 2, 1981), the Court held the Act constitutional on this ground, noting that Congressional enactments could be withdrawn or repealed without creating any impact on the first amendment, and that limited withdrawal of anticompetitive protection, which the Act accomplishes, did not abridge the freedom of the press.

CONCLUSIONS OF LAW

1. The Post-Intelligencer, considered regardless of its ownership or affiliations, is in probable danger of financial failure and is a failing newspaper within the meaning of the Newspaper Preservation Act. 15 U.S.C. §§ 1801-04, § 1802(5).

2. Approval of the joint operating arrangement will effectuate the policy and purpose of the Act. 15 U.S.C. §§ 1801, 1802(2), 1803(b).

Recommended Order

The Administrative Law Judge recommends to the Attorney General that an order be entered, as follows:

> Upon consideration of all the facts and applicable law, it is hereby ordered that the application of The Hearst Corporation, owner of the Seattle Post-Intelligencer, and Seattle Times for approval of a joint operating arrangement pursuant to the Newspaper Preservation Act, 15 U.S.C. 1801, et seq., be, and the same hereby is, approved.

Respectfully submitted,

/s/ Daniel H. Hanscom
DANIEL H. HANSCOM
Administrative Law Judge

January 14, 1982

BEFORE THE ATTORNEY GENERAL
OF THE UNITED STATES

DOCKET NO. 44-03-24-6

In the Matter of:

Application by Seattle Times Company and The Hearst Corporation for Approval of a Joint Newspaper Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804

ANTITRUST DIVISION'S EXCEPTIONS TO THE RECOMMENDED DECISION OF THE ADMINISTRATIVE LAW JUDGE

On January 15, 1982, the Administrative Law Judge filed his Recommended Decision with the Attorney General, concluding that the application for a joint operating arrangement in Seattle should be approved. Pursuant to Section 48.10(e) of the Department's regulations under the Newspaper Preservation Act (28 C.F.R. § 48.10(e)), the Antitrust Division submits the following exceptions to the Recommended Decision. We believe the Attorney General should reject the Recommended Decision and deny the application.

I. INTRODUCTION

On March 27, 1981, Seattle Times Company, publisher of the Seattle Times, and The Hearst Corporation, publisher of the Seattle Post-Intelligencer, ("Applicants") filed an application for approval of a proposed joint operating arrangement in Seattle pursuant to the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804. The Act authorizes a limited antitrust

exemption for a prospective joint operating arrangement[1] if the parties obtain the prior written consent of the Attorney General.

Before granting approval of a joint operating arrangement, the Attorney General must find that one of the newspapers involved is a "failing newspaper," defined in the statute to mean "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. §§ 1803(b), 1802(5). He must also find that approval of the arrangement would effectuate the policy and purpose of the statute. The Applicants have the burden of proving the proposed arrangement satisfies the requirements of the Act. 28 C.F.R. § 48.10(a)(4). Here the application alleged that the Seattle Post-Intelligencer (P-I) was a "failing newspaper."

The role of the Assistant Attorney General in charge of the Antitrust Division in proceedings under the Newspaper Preservation Act is set forth in the Department's regulations. The Assistant Attorney General initially submits a report to the Attorney General recommending either that the proposed arrangement be approved or disapproved or that a hearing be held to resolve material issues of fact. 28 C.F.R. § 48.7. If a hearing is held, the Assistant Attorney General participates as a party. 28 C.F.R. § 48.10(b).

In the two hearings held thus far under the Newspaper Preservation Act, the Antitrust Division has neither supported nor opposed the applications until the close of the hearing. We have attempted to develop complete records to assist

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[1] The term "joint newspaper operating arrangement" is broadly defined to include almost any form of arrangement or joint venture between two or more independently-owned newspapers "pursuant to which joint or common production facilities are established or operated," provided that "there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined." 15 U.S.C. § 1802(2). Thus, a joint operating arrangement allows the complete elimination of commercial competition between the newspapers.

the Attorney General in resolving the factual issues presented and applying the appropriate legal standards. After the hearing on the Cincinnati application, the Assistatn Attorney General recommended approval. In the Anchorage and Chattanooga proceedings, the Assistant Attorney General recommended, respectively, approval and partial approval without a hearing. The Seattle application is the first for which the Assistant Attorney General has recommended denial.

Prior to the start of the hearing, Administrative Law Judge Daniel H. Hanscom barred the Antitrust Division and the Intervenors from discovering and introducing evidence related to incremental cost/benefit analysis. Incremental analysis, a method of determining the P-I's net financial contribution to its owner, Hearst, had been proposed by the Antitrust Division in its May 29 Report to the Attorney General as a method to be used during a hearing on the Seattle application. After the Administrative Law Judge's ruling, the Antitrust Division immediately filed a Petition with the Attorney General asking for its reversal. The Attorney General denied the Petition in view of the expedited hearing schedule previously ordered. He stated, however, "I expressly reserve judgment on the factual and legal issues which are raised by the Antitrust Division's proposed 'incremental cost/benefit analysis.' The terms of the Newspaper Preservation Act certainly do not preclude all inquiry into financial relationships between parent corporations and their newspaper subsidiaries." Attorney General Order No. 962-81.

The hearing began on November 2, 1981, and lasted for three and one-half weeks. The Antitrust Division, in its Post-Hearing Brief, contended that the Applicants had not established that the P-I is a failing newspaper and recommended that the application be denied.

The Administrative Law Judge concluded that P-I is in probable danger of financial failure and recommended that the application be granted. Two rulings in particular were crucial to his decision. Relying on the "regardless of its ownership or

affiliations" clause of the statute, 15 U.S.C. § 1802(5), the Administrative Law Judge held that the P-I's financial condition and prospects for survival should be evaluated as if the P-I were a "free standing entity, separate and independent" of Hearst and, consequently, that incremental analysis was irrelevant to the question of whether the P-I is a failing newspaper. Recommended Decision at 87, 99. He also held that although the P-I could in all probability be sold at fair market value to a party willing and able to continue its operation, that fact does not require denial of a joint operating arrangement because the statute does not require Hearst "to offer the Post-Intelligencer for sale, or to demonstrate that it cannot be sold to a buyer willing and able to continue it in operation as an independent editorial voice." *Id.* at 84, 88.

In our view, the Administrative Law Judge's interpretation of the Newspaper Preservation Act is inconsistent with congressional intent and rational economic analysis. The legal errors we perceive here are not only of significance to the Seattle application, but also set an erroneous precedent of future proceedings under the Act.

II. THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION SHOULD NOT BE ADOPTED BECAUSE THE ADMINISTRATIVE LAW JUDGE APPLIED INCORRECT LEGAL STANDARDS IN DETERMINING THAT THE P-I IS IN PROBABLE DANGER OF FINANCIAL FAILURE

A. Congress Intended That Commercial Competition Between Newspapers Be Sacrificed Only When Necessary To Preserve Independent Editorial Voices

The Newspaper Preservation Act permits rival newspapers the commercial windfall of eliminating competition only where one newspaper is "in probable danger of financial failure." Under the Administrative Law Judge's view of the law, however, the "in probable danger of financial failure" standard is highly artificial, requiring only a showing of past accounting losses on financial statements, without regard to the actual,

practical danger of economic failure and the loss of an editorial voice. Indeed, Judge Hanscom expressly disclaimed any finding that the P-I is in practical danger of closing, stating that "it is not clear what will be the fate of the Post-Intelligencer if the joint operating arrangement is disapproved." Recommended Decision at 88.

The legislative history of the Act demonstrates, however, that Congress intended to sacrifice commercial competition only when necessary to maintain an editorial voice. Thus, the Senate Report on the Act assumed that the essential objective of the failing newspaper test is to determine "whether a paper is likely to disappear as a competitive factor." S. Rep. No. 91-535, 91st Cong., 1st Sess. 4 (1969) ("Senate Report"). In the words of Senator Hruska, one of the floor leaders for the bill and a member of the Senate Committee that reported it:

> The purpose of this bill, S.1520, as introduced, and as stated in the above report and by certain witnesses, including Senator Carl Hayden, the introducer of the predecessor bill, . . . was to make clear that when two newspapers entered into a joint business agreement or combination *necessary to save one or the other or both from going out of business*, then the parties are not guilty of an antitrust violation . . . .

Id. at 15 (Individual Views of Senator Hruska) (emphasis added).

Similar statements appear in the floor debates. For example, Representative McCulloch, a supporter of the bill, declared:

> [T]he prospective application of this exemption now is carefully circumscribed by requiring the consent of the Attorney General for any future joint newspaper arrangements. With such safeguards, the future availability of the antitrust exemption for newspapers in other cities should be *limited only to those situations where a joint newspaper operating arrangement is demonstrably essential to prevent a newspaper failure and to promote editorial and reportorial competition.*

116 *Cong. Rec.* 23148 (1970) (emphasis added). Senator Hruska also emphasized that a joint operating arrangement was to be a last resort:

> [S]ection 4(b) [15 U.S.C. § 1803(b)] will act as a brake upon other newspapers which might otherwise prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition.

116 *Cong. Rec.* 2006 (1970). According to Senator Inouye, a sponsor of the bill:

> With prior approval from the Department of Justice this legislation provides further the vehicle for the preservation of news and editorial competition in any of these remaining 37 [cities with competitive newspapers] where it cannot otherwise survive.

Id. at 1786. Therefore, as Administrative Law Judge Donald R. Moore observed in the Cincinnati proceeding:

> [A] joint operating agreement is to be permitted only if it is clear that both commercial and editorial competition cannot be achieved.

Recommended Decision of Judge Moore at 125.

Approving the elimination of commercial competition through a joint operating arrangement where the Applicants have not shown a danger that an editorial voice would otherwise be lost is thus contrary to congressional intent. It also violates the settled rule that exemptions to antitrust laws are to be construed narrowly, to effectuate the specific congressional purpose. *See, e.g., Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed. . . . This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions.").

A newspaper need not be at the brink of bankruptcy to qualify for a joint operating arrangement. The legislative history demonstrates that Congress was concerned that the

"failing company" doctrine as applied in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), was too stringent as applied to newspapers in view of the public interest in preserving independent editorial voices. *See* H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 10 (1970) ("House Report"); Senate Report at 4. Under the "failing company" test, an allegedly failing company has the burden of demonstrating that it is on the brink of liquidation, that its prospects for reorganization are "dim or nonexistent," and that it has affirmatively sought other purchasers. 394 U.S. at 138. It was Congress' judgment that newspapers should not be pushed to the brink of liquidation, with dim or nonexistent prospects for reorganization, because of the risk that editorial voices might be lost.[2]

However, Congress did not intend to dilute the standard to the point of permitting every newspaper that experiences financial distress to enter a joint operating arrangement.[3] To the contrary, if a newspaper is in no real danager of disappearing as an editorial voice, Congress intended that a joint operating arrangement be denied.

The Administrative Law Judge's failure to recognize that whether an editorial voice is in practical danger of disappearance is the crucial consideration led to two major legal errors: his exclusion of evidence on incremental analysis and his failure to recognize the significance of the possibility of sale of the P-I to a purchaser able and willing to operate it as an independent newspaper. These errors are discussed below.

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[2] Several sponsors of the Act expressed concern that such strict application of *Citizen Publishing* would fail to preserve independent editorial voices in many cities. *See, e.g.*, 116 *Cong. Rec.* 23167-68 (1970) (remarks of Representative Annunzio).

[3] Compare the "financially sound" standard applied to pre-existing arrangements with the "in probable danger of financial failure" standard applied to prospective arrangements. *See* 15 U.S.C. § 1803(a) and 15 U.S.C. § 1803(b). The House Report confirmed that the latter standard is a stricter one than the "financially sound" standard. House Report at 10.

B. The Administrative Law Judge Erred, As A Matter Of Law, By Excluding Evidence On Incremental Analysis

Incremental analysis addresses the central issue of whether a newspaper is in danger of shutting down and thereby disappearing as an editorial voice. Incremental analysis is the common sense methodology used by businessmen to determine whether a portion of a business that appears to be unprofitable should be continued or abandoned. Davidson 2536; Rosse 815-16. The businessman simply asks himself whether his overall business would, on balance, gain or lose if the unit or operation in question were shut down.[4] *See* Section III. A. *infra*.

Judge Hanscom agreed that incremental analysis is commonly used by businessmen to determine whether allegedly failing enterprises should be continued. He noted during closing arguements: "I recognize the economic aspects of incremental analysis. It's totally valid. There's no question about it. I don't question it in the slightest." Tr. 4283. He incorrectly assumed, however, that this pragmatic, conceptually simple analysis is barred by the statutory requirement that whether a newspaper is "failing" be determined "regardless of its ownership or affiliations." 15 U.S.C. § 1802(5).[5]

This qualification, however, merely embodies a congressional recognition that an individual newspaper may be an economic failure even if it is owned by a business that is not failing. The legislative history demonstrates that Congress'

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[4] The businessman does not ask himself whether, if he had it to do over again, he would have continued the particular operation until now. Such thought processes would not produce a rational answer as to what should be done *now*.

[5] The phrase "regardless of its ownership or affiliations" should be construed in light of the decision by the Court of Appeals for the District of Columbia Circuit in *Newspaper Guild* v. *Levi*, 539 F.2d 755 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977). The *Levi* decision teaches that no individual section of the Act should be interpreted independent of the Act's legislative history viewed in its entirety.

purpose was to avoid a requirement that a "deep pocket" parent, which is not a failing business, deplete all of its financial resources before applying for a joint operating arrangement. If a "deep pocket" applicant faced such a requirement, the rational decision would be to shut down the economically failing newspaper rather than continue to subsidize it, thereby depriving the public of an editorial voice. These points were made clear when Senator Hruska interpreted the phrase "regardless of its ownership or affiliations" as follows:

> The purpose of including this language is to insure the judicial interpretation that each newspaper which claims to be, or has been, a "failing newspaper" is a separate entity. The question of whether a paper is failing should be based upon the financial operations of that paper, and not upon the presence or absence of financial support from other newspaper business activities in other cities or from other financial activities of the owners of the failing newspaper.
>
> *If we were to eliminate the language suggested, then a reviewing court could find that so long as the owners of a paper had other resources, they would have to continue to invest all other funds in the failing paper until there was nothing left to invest.* Thus, the test would not be whether the newspaper was failing, but whether the owners of the newspaper were themselves failing.
>
> *Such a test would pervert the purpose of the bill. The intent is to maintain and continue separate news and editorial voices. If, however, the owners of a failing newspaper had to make a choice as to whether they should continue to waste all of their assets in a losing paper, or simply sell out to a competitor — or close down the paper itself — then there would be a loss of editorial voices. . . .* The owners would be most unlikely to "send good money after bad," as this would be a rather irresponsible business practice. In other words, deleting the language here proposed would destroy, to considerable extent, the intent and purposes of the bill.

116 *Cong. Rec.* 2006 (1970) (emphasis supplied). *See also id.* at 1786 (remarks of Senator Inouye); *id.* at 1999 (remarks of Senator Fong); Senate Report at 5.

Congress' concern that separate and independent editorial voices would be threatened by shutdowns if newspaper chains' capital resources precluded them from entering into joint operating arrangements under the Act does not, however, preclude an examination of whether the chain — or any other owner — would be in a better or worse financial position if the allegedly failing newspaper were continued in operation. Failure to consider such analysis under the Act would be inconsistent with business reality and would ignore the central question under the Act: whether, absent a joint operating arrangement, an editorial voice is in danger of being lost. Congress did not intend the Attorney General to ignore that issue in favor of a wholly artificial and speculative inquiry into the prospects of an independent P-I that does not exist.

C. The Administrative Law Judge Erred, As a Matter Of Law, In Rejecting The Significance Of Available Purchasers Able And Willing To Operate the P-I As An Independent Newspaper

Judge hanscom found that the P-I could in all probability be sold at fair market value to a buyer who would continue it in operation as an independent metropolitan daily newspaper. Recommended Decision at 84 (Finding 158). *See* Section III. B. *infra*. Nonetheless, he concluded that the proposed joint operating arrangement should be approved. This is a plain error of law.

The significance of available purchasers able and willing to continue operating a newspaper is apparent. The availability of such purchasers indicates there is a way of maintaining editorial competition without sacrificing commercial competition. If an editorial voice is not in any practical danger of disappearance, a joint operating arrangement is not necessary to serve the congressional purpose and would only serve to afford the Applicants monopoly profits derived from the elimination

of commercial competition.[6] Moreover, the willingness of rational businessmen to purchase a newspaper with the intent to operate it as an independent, competitive entity is strong evidence that the newspaper is not, in any realistic sense, failing. Indeed, Congress assumed that by the time a newspaper has declined to the point at which it would be eligible to enter into a joint operating arrangement, alternative purchasers would not be available. Senator Inouye, for example, expressed the view that "[t]here is no market for independent ownership of a failing newspaper. . . ." 116 *Cong. Rec.* 1786 (1970). According to the Senate Report, "when a newspaper is failing . . . it is almost impossible to find an outside buyer." Senate Report at 4. *See also* 116 *Cong. Rec.* 23146 (1970) (remarks of Representative Kastenmeier).

Finally, references in the legislative history to *United States* v. *Third National Bank*, 390 U.S. 171 (1968), provide additional support for the proposition that Congress did not intend to sacrifice commercial competition where there are available purchasers who would continue operating the newspaper as an independent entity. The legislative history of the Act demonstrates that Congress intended the failing newspaper test to be analogous to the standard used to test bank mergers. According to the Senate Report at 2:

> [T]he phrase "is in danger of probable failure" [sic] [has been added to] the definition of a "failing newspaper," this phrase is taken from the Bank Merger Act and has been the subject of a Supreme Court opinion in *U.S.* v. *Third National Bank* (390 U.S. 171 (1968)).

Senator Hart, in discussing a proposed change in the definition of "failing newspaper" to include "in probable danger of failure" language, noted that: "A court would be able to apply as precedent decisions under the Bank Merger Act which uses similar language." 116 *Cong. Rec.* 2004 (1970). While the

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[6] While Congress intended to preserve independent editorial voices, there is no indication it intended to preserve the editorial voice of a particular owner at the price of eliminating commercial competition.

House Report does not refer to the Bank Merger Act or to *Third National Bank*, the legislative history supports a similar conclusion. *See* 116 *Cong. Rec.* 23146 (1970) (remarks of Representative Kastenmeier).

In *Third National Bank*, the Court held that an anticompetitive bank merger should not be approved where the bank failed to meet its burden of demonstrating that the benefits to the convenience and needs of the community outweighed the anticompetitive effects of the merger. Fatal to the bank's defense was its failure to explore the possibility of sale to others. The bank in that case suffered from inadequate management. The sale of the bank to new owners who would inject more vigorous management might thus have improved the bank's prospects, and allowed the bank to survive without the elimination of competition.

In view of Congress' apparent intention that the *Third National Bank* decision be viewed as precedent in proceedings under the Newspaper Preservation Act, a proposed joint operating arrangement should not be approved where there are other measures that would enable the allegedly failing newspaper to survive. One such alternative measure is sale of the newspaper to someone who will continue to operate it as a commercially competitive entity. Where that alternative appears to exists, the applicants have not met their burden under the Act.

The Administrative Law Judge's rejection of *Third National Bank* is an unexplained departure from precedent. The Administrative Law Judge noted that the House Report contains no reference to *Third National Bank*, and concluded that the reference in the Senate Report is based on a factual mistake, *i.e.*, that the phrase "in probable danger of financial failure" has been interpreted by the courts in decisions under the Bank Merger Act. These observations are not new,[7] and

[7] The intent of Congress is controlling even if its premises were wrong. The relevant point is that Congress intended to incorporate under the Newspaper Preservation Act a standard analogous to the standard articulated in *Third National Bank*.

Judge Moore was aware of them in the Cincinnati proceeding. *See* Recommended Decision of Judge Moore at 120-25. After thoroughly reviewing the legislative history of the Newspaper Preservation Act, Judge Moore held that "it is reasonable to conclude that Congress intended the 'failing newspaper' test to be interpreted with reference to the substantive standards established by the Supreme Court in [*Third National Bank*]." *Id.* at 123.

> The thrust of the [*Third National*] *Bank* decision, as applied to this case, is that a joint operating arrangement should be approved only if there are no alternative measures available that would permit continued publication of the allegedly failing newspaper.

Id. at 125. Judge Moore's opinion, with the exception of his finding and the portion of his memorandum opinion rejecting use of incremental analysis of the Cincinnati Post, was adopted by Attorney General Civiletti in his November 26, 1979, Order.

Judge Hanscom also ignored Judge Moore's ruling that a refusal to "consider" sale of a newspaper would be a barrier to approval of a joint operating arrangement: "(1) if there were evidence of a buyer ready, willing, and able to purchase the [allegedly failing newspaper] or (2) if it were demonstrated that under new ownership the [allegedly failing newspaper] could become a profitable enterprise without a joint operating agrrangement." Recommended Decision of Judge Moore at 127.

Judge Hanscom's only affirmative support for his view that the availability of purchasers who are willing and able to operate the newspaper as an independent entity is legally irrelevant is the congressional intention to adopt a standard less stringent than the traditional failing company defense applied in *Citizen Publishing*. Whil the Act's definition of failing newspaper is less stringent than the *Citizen Publishing* test (*see* Section II. A. *supra*), there is no indication that Congress intended to ignore the significance of evidence that purchasers who would continue to operate the newspaper as a

commercially competitive entity are available. Where such purchasers are available, the allegedly failing newspaper cannot be deemed "in probable danger of financial failure," and elimination of commercial competition is not justified.

III. THE APPLICANTS FAILED TO MEET THEIR BURDEN OF DEMONSTRATING THAT THE P-I IS IN PROBABLE DANGER OF FINANCIAL FAILURE

As we noted, the Applicants bear the burden of proving that the P-I is a failing newspaper before the proposed joint operating arrangement can be approved. The Applicants failed to carry that burden. They have demonstrated neither that Hearst is likely to close the P-I, nor that available purchasers would not continue to operate the P-I as an independent entity. Accordingly, there is no basis in the record for a conclusion that the P-I is in danger of closing, and the application must be denied.

A. Application Of Incremental Analysis Demonstates That Hearst Will Likely Receive A Net Benefit In The Future From Operation Of The P-I

1. The Methodology of Incremental Analysis

Incremental analysis is the common-sense approach used by businessmen to determine whether one part of a business, a part that appears to be losing money, should be continued or abandoned. The businessman simply asks himself whether the position of his overall business would be better or worse if the unit or operation in question were shut down. His analysis compares the expected future cash inflows that he would derive from the particular operation with the expected future cash outflows necessary to continue that operation. Davidson 2436-38, 2607-08.

Accordingly, in the case of an allegedly failing newspaper that is part of a larger enterprise, the owner estimates the revenues that would be foregone by shut-down and the expenses that would be avoided or incurred by shut-down. He

also considers the magnitude of capital expenditures he would have to make in order to continue operating the newspaper and considers the impact on his overall business of putting the assets devoted to the newspaper to other uses.

This analysis of an allegedly failing newspaper can begin by focusing on the operating expenses and revenues that the newspaper is likely to generate in the future. Ideally, accurate projections would be available. Where such projections do not exist, however, past operating performance can usually be used as a reliable indication of future performance. Thus, a series of the newspaper's recent financial statements* is a suitable starting place for the analysis.

Using these recent financial statements, the first step would be to deduct from the expense side all costs that would be incurred by the newspaper's owner even if the newspaper were shut down. These costs are said to be "non-incremental." Portions of the overhead costs allocated to a newspaper by its owner would constitute an example of such costs. Unlike costs such as newsprint and reporters' salaries ("incremental costs"), the owner can not avoid non-incremental costs by shutting down the paper. While non-incremental costs are proper expenses to include on a financial statement, for accounting purposes, they are not relevant to the decision to close down an operation or continue it.

Another item to be removed from the reported losses is depreciation. Depreciation merely reflects past capital expenditures, which are irretrievable. Moreover, depreciation does not represent a current cash outflow. Incremental analysis looks to the future and, specifically, future cash inflows and outflows. The relevant question regarding capital expenditures is the amount of such cash expenditures that will be required in the *future*, not the amount spent in the past. Future capital expenditures may be greater than, less than, or

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* Using a number of years instead of one has two advantages: It may show a trend, and it also limits the effect of an atypical year.

equal to the past expenditures reflected in depreciation charges. Where there are reliable estimates of future capital expenditures those estimates, and not past figures, should be used. While incremental analysis must consider the magnitude of *future* capital expenditures likely to be necesssary, it ignores past capital expenditures, since they do not affect the decision to continue or close down the operation. Thus, depreciation must be removed from the financial statements.[9]

Next, the analysis must consider the tax benefits to the owner of operating the newspaper. The owner is interested in computing all of the effects on cash inflows and outflows to his business that would be caused by a decision to close the newspaper. Taxes are clearly a significant element of cash outflow, and a reduction in tax liability is a benefit to the business. Accordingly, the newspaper owner would analyze how its overall tax liability would be affected by its decision concerning the newspaper.[10] Revenues attributable to the operation of the newspaper (incremental revenues) would no longer be reported as income by the owner if the newspaper were closed. Likewise, incremental costs, *e.g.*, newsprint and reporters' salaries, would no longer be available as deductible business expenses if the newspaper were closed. Moreover, depreciation may be claimed as a tax deduction, even though it does not represent a current expenditure.[11] Shutting down the newspaper would deny the owner the deductions attributable to in-

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[9] This does not, of course, suggest that depreciation is not an appropriate item on a financial statement. It merely suggests that when an incremental analysis is performed, depreciation should be removed as part of that analysis.

[10] This analysis assumes, as is the case with the P-I and Hearst, that reporting is done on a consolidated basis.

[11] Actually, the figures for depreciation appearing on a company's financial and tax statements may differ because different schedules are used. As Dr. Davidson recognized, this requires additional computations. Davidson 2559.

cremental costs and depreciation.[12] To the extent that the tax deductions attributable to continued operation of the newspaper exceed the income attributable to the newspaper, continuation of the newspaper reduces the owner's tax liability. The owner calculates the tax benefit by calculating the excess of the deductions generated by operating the newspaper (depreciation plus incremental costs) over the incremental revenues, and multiplying that by his marginal tax rate. This tax benefit should be added as a benefit that would be lost in the event the newspaper is shut down.

To summarize, under incremental analysis, the owner of the allegedly failing newspaper would adjust the reported losses on the financial statements by removing depreciation and non-incremental expenses and by adding the tax benefit realized by the newspaper's operation. If the result at this point is a negative number (the cash outflows from operating the newspaper exceed the cash inflows), then the paper appears to be a drain on the owner's resources and an economic failure.[13]

If, however, the sum of the adjustments is positive, then the newspaper appears to be making a "net contribution" to its owner, in the sense that the operation is generating revenues

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[12] Shutting down the newspaper could, in some situations, provide the owner with an alternative tax benefit. If the newspaper were closed, and if the owner could not use the assets elsewhere in his business or sell them for an amount equal to his tax basis, he would be entitled to claim a tax loss. However, there is no indication in the record that this is such a situation. Hearst estimated it could sell the PI's assets (land, building, and equipment) for an amount apparently in excess of its basis in them. IX 80. If this estimate were correct Hearst would realize a gain for tax purposes.

[13] Encouraging prospects for the newspaper may, however, negate this conclusion. The calculated figures are, after all, based on past operating results, on the premise that they provide at least a somewhat reliable estimate of the future. Other reliable evidence indicating that the future will be better or worse than the past cannot be ignored.

greater than the expenses it generates. The analysis would then consider the capital expenditures expected to be necessary in the future. If the net contribution exceeds the anticipated capital expenditures, we may conclude that the owner is receiving a financial benefit from operating the newspaper, and is likely to continue to do so. Davidson 2567-69.

A final consideration involves alternative uses of the assets that are tied up in the newspaper. By devoting economically valuable assets to the newspaper, the owner may forego other opportunities. If in a particular case, the magnitude of these lost opportunities greatly outweighs the benefits of running the newspaper, the owner may close the newspaper. Davidson 2541-42.

2. Incremental Analysis of the P-I

During the hearing, the Administrative Law Judge allowed the Antitrust Division to make an offer of proof consisting of two hours of expert testimony on incremental analysis and a limited number of exhibits. Although other facts relevant to incremental analysis were received into evidence, most of the evidence necessary to support an incremental analysis is in the record solely by proffer.[14] We submit that the Attorney General should convert the offers of proof to evidence. The Attorney General has the power to do this. *See* 10 Moore's Federal Practice ¶ 103.21-.23 (2d ed. 1981). If this is done, the record will demonstrate that Hearst has not satisfied its burden of proving the P-I is a failing newspaper.

The expert testimony that the Antitrust Division presented was that of Dr. Sidney Davidson, former Dean of the University of Chicago business school and an eminent accounting expert who has written extensively on the incremental concept. Judge Hanscom qualified him as an expert in this area (Tr. 2535), although his testimony and related exhibits were re-

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[14] Hearst submitted a counteroffer of proof related to incremental analysis on December 9, 1981.

ceived as an offer of proof only. Dr. Davidson was the only expert to testify in detail concerning the incremental concept.

Dr. Davidson, after describing the methodology of incremental analysis,[15] performed an incremental analysis of the P-I. Davidson 2555-78. Dr. Davidson began by looking at the P-I's financial statements for the years 1976-1980 and estimates for 1981. He did this because of the lack of reliable future projections[16] and because the past operating results provide assistance in arriving at a reasonable estimate of future operating results. Davidson 2567-68.

Dr. Davidson adjusted the expense side of the P-I's statements by eliminating non-incremental costs (costs Hearst would not avoid if it shut down the P-I). To identify these costs, Dr. Davidson looked at certain of Hearst's "affiliated entity charges" that are shown on the P-I's financial statements.

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[15] During his testimony, Dr. Davidson presented a "Failing Ferry Boat" example to illustrate how an incremental analysis of a company is performed. The testimony is found at pages 2548-53 of the hearing transcript; the related exhibit is GX 47. The example demonstrates how a company losing money on a fully allocated cost basis (*i.e.*, as reported on its income statements) returns a net contribution to its owner.

[16] Solely for purposes of the hearing, Hearst prepared in October 1981 a pessimistic five-year projection for the P-I's operation. HX 75.1. It was prepared with the requirements of the Newspaper Preservation Act in mind and must be contrasted with earlier, more optimistic predictions by its executives. *See, e.g.*, GX 1D (estimate made by Hearst's treasurer in September 1980, before announcement of the joint operating arrangement, that the P-I's 1985 loss on a fully allocated cost basis would be $1.3 million; the Hearst projection for 1985 prepared for purposes of the hearing is for a loss of $5.8 million). Hearst's five-year projection appears unduly pessimistic in light of factors tending to indicate brighter prospects for the P-I's future. *See* Antitrust Division's Proposed Findings of Fact 102-98; Intervenors' Memorandum at IV-101-28. Hearst's pessimistic projection is not supported by other evidence in the record and should be rejected.

These are charges that Hearst apportions among its newspapers to defray Hearst's cost of providing them with various centralized services. Dr. Davidson sought to determine the portion of these expense items on the P-I's financial statements representing costs that Hearst would incur even if the P-I were closed.

Dr. Davidson based his estimate of non-incremental costs on the testimony of Hearst's treasurer concerning four categories of affiliated entity charges.[17] Hearst's treasurer testified that if Hearst shut down the P-I, it would incur virtually the same costs in these categories in order to provide the identified services to other Hearst properties, including its other newspapers. Mitnick 1965-97, 1968, 1701, 1719-20. These charges to the P-I thus represent non-incremental costs of Hearst that would not be reduced by shutting down the P-I. Dr. Davidson adjusted the P-I financial statements to take account of these non-incremental costs. Since they are costs that Hearst would not avoid by shutting down the P-I, they were removed from the expense side of the P-I's ledger and reported losses reduced accordingly.

Dr. Davidson's estimates of non-incremental costs were conservative: certain affiliated charges appeared to be partially incremental and partially non-incremental, but he was unable to determine the appropriate apportionment because of Judge Hanscom's order precluding discovery on this issue. He assumed that none of these affiliated charges included any non-incremental costs, *i.e.*, that these charges reflected only incremental costs that should not be deducted under incremental analysis from the expense side of the P-I's financial statements. These conservative estimates of non-incremental costs gave the Applicants the benefit of every doubt.

Dr. Davidson also removed depreciation from the expense side of the P-I ledger. As explained above, this was done

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[17] Editorial Management Assessments, General Management Assessments, Hearst Advertising Service, and Hearst Headline Service.

because depreciation reflects past, irretrievable capital expenditures that represent no current cash outflow, and only *future* capital expenditures are relevant under incremental analysis. Davidson 2540-43, 2568-69, 2609. (Reliable estimates of future capital expenditures are available and were appropriately factored in. *See* page 29-30 *infra*.)

Dr. Davidson estimated the tax benefits Hearst derives from operating the P-I in the manner described above. He calculated the excess of deductions for Hearst generated by operating the P-I over the income thereby generated, and applied the marginal tax rate.[18]

The result is the tax benefit that Hearst obtains from operating the P-I: It is the difference between the taxes Hearst pays and the greater amount of taxes that Hearst would have to pay if the P-I were shut down.

Finally, Dr. Davidson removed extraordinary items from the expense side of the P-I ledger, and adjusted the P-I's reported losses accordingly. This was done because extraordinary items are one-time expenditures that, while providing a long-term pay-back or some other benefit, are not expected to recur. Accordingly, an analysis that looks to the future ignores past extraordinary items.

Dr. Davidson's adjustments and calculation of the net contribution to Hearst of operating the P-I, using recent P-I

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[18] As suggested above, incremental costs and depreciation should be part of the tax benefit calculaton. If non-incremental costs were included, there would be a double counting of benefits flowing to Hearst from operating the P-I. Expenses attributable to "extraordinary items" are also removed from the tax benefit calculus since by definition these are one-time expenditures that are not expected to recur.

financial statements as starting points, are presented in the table below:

	(thousands of dollars)					
	1976	1977	1978	1979	1980	1981 (est)
Reported Loss	(1188)	(1391)	(831)	(971)	(1535)	(2663)
Affiliated Payments (EMA, GMA, HAS, HHS)	480	543	523	603	743	889
Depreciation	369	391	396	478	553	621
Extraordinary Items	49	446	257	94	0	0
Tax Benefit	364	189	22	150	540	888
Total Benefits	1259	1589	1198	1325	1836	2398
Net Contribution of P-I to Hearst	71	198	367	354	301	(265)

GX 48 (Assumption C).[19]

In every year during the period 1976-1980, Dr. Davidson found that the P-I made a positive net contribution to Hearst, indicating that it is likely to do so in the future. The net cash drain for 1981 must be viewed with skepticism.[20]

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[19] This Assumption is the most conservative assumption Dr. Davidson made and the most favorable for Hearst. *See* pages 26-27 *supra*.

[20] An accurate estimate for 1981 could not be made because Hearst did not disclose the required information. In addition, the results of 1981 are atypial; they are not reliable indicators of the P-I's future operations because of events that occurred in 1981, including announcement of the joint operating arrangement. The publisher of the P-I testified that the 1981 results were adversely affected by the economic recession in Seattle. The P-I also undertook an extensive format change in 1981, accompanied by heavy promotion costs. Fassio 1436.

Hearst's counter-offer of proof focuses upon the capital expenditures and additions to working capital that Hearst made to the P-I in those past years (*see* Hearst's Counter-offer at ¶¶ 22-28). Any necessity for such contribution in the future would indeed be relevant to the P-I's future prospects. As noted above, past capital expenditures do not necessarily indicate what capital contribution Hearst may be required to make to the P-I in the future; it is projected *future* expenditures that are relevant to the question of whether it would be more profitable to shut down the P-I rather than continue its operation. The most probative evidence in the record of likely future capital expenditures are Hearst's own estimates, showing a decline from $367,000 in 1981 to $43,000 in 1982, $117,000 in 1983, $195,000 in 1984, and $54,000 in 1985. Hearst's Counter-offer at ¶ 31. These relatively modest figures for future capital expenditures are not surprising in light of the record, which demonstrates that the P-I has state-of-the-art equipment in all of its departments except the pressroom and mailroom. Fassio 1188-89, 1317-18. Judge Hanscom found that the P-I's presses could operate at their present levels indefinitely with $300,000 in repairs and modifications. Recommended Decision at 85 (Finding 159). Investment in the mailroom is not needed before 1985. HX 75.1S.

Looking at Dr. Davidson's incremental analysis of the P-I and anticipated future capital expenditures, the P-I's anticipated future net contribution to Hearst (based upon the results of recent years) appears more than sufficient to cover its anticipated future capital expenditures.

There is no indication that the P-I's anticipated future net contribution to Hearst, less anticipated future capital expenditures, would be exceeded by the value of Hearst's next best alternative use (or "opportunity costs") for the P-I's assets. Hearst, in its counter-offer, raises no issue as to the alternative uses of the assets it has tied up in the P-I. The Antitrust Division, in its Post-Hearing Brief at 24-25, per-

formed a rough opportunity cost analysis based upon the newspaper's liquidation value.[21]

We concluded, based on the current record, that the opportunity costs to Hearst of continuing the P-I's operations would not exceed several hundred thousand dollars per year. Judge Hanscom's assertion on page 99 of his Recommended Decision that "Hearst could logically determine that it could obtain a substantially greater 'net benefit' by putting the value of the assets of the Post-Intelligencer (for example, its real property) to a more lucrative use" has no support in the record.

We urge that the Attorney General adopt the Antitrust Division's Proposed Findings of Fact on incremental analysis (Findings 56-90A). If the offers of proof are, as we suggest, accepted into evidence, it appears that the P-I will return a net contribution to Hearst in the future that will more than cover necessary capital expenditures through 1985 by an amount likely to equal or exceed the opportunity costs of continuing to publish the P-I. Therefore, on this record, Hearst has not satisfied its burden of proving the P-I is a failing newspaper.

If, however, the Attorney General finds that despite Hearst's having cross-examined Dr. Davidson and presented a counter-offer of proof, the proffers are incomplete or inadequate, he should reopen the hearing record to permit its supplementation on the issue of incremental analysis.[22]

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[21] Normally, the opportunity costs would be determined by the sale value of the newspaper, rather than its liquidation value. The P-I, however, has not been for sale in the recent past and all indications are it will not be for sale in the near future. Recommended Decision at 83 (Finding 156).

[22] The Antitrust Division and the Intervenors were precluded from discovering the information necessary to develop a complete incremental analysis of the P-I. If permitted, the parties would have sought additional discovery and offered additional evidence on this point.

B. There Are Qualified Potential Purchasers Willing And Able To Continue Publishing The Post-Intelligencer Without A Joint Operating Arrangement

The Administrative Law Judge held the existence of qualified potential purchasers for the P-I irrelevant to the question of whether it is a failing newspaper; however, he did admit evidence and made findings of fact concerning the prospects for sale of the P-I and the ability and willingness of prospective buyers to continue it as an independent editorial voice. Judge Hanscom's conclusions are summarized in Finding 158 (Recommended Decision at 84):

> Considering that the Post-Intelligencer is not, and has not been for sale, and that all inquiries regarding possible purchase have been rebuffed by The Hearst Corporation with statements to that effect, and that responsible prospective purchasers nevertheless continue to appear and express an interest in buying the Post-Intelligencer, it must be concluded that the Post-Intelligencer could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily.

This finding compels denial of the application. Judge Hanscom's findings on the subject are unambiguous. The existence of purchasers who would continue operating the P-I as a commercially competitive newspaper means that the Applicants have not met their burden. *See* Section II. C. *supra*.

A particularly compelling fact supporting denial of the application on this basis is the apparent availability of purchasers

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We are cognizant that the Attorney General wishes to complete this proceeding as expeditiously as possible. If the Attorney General does not conclude that the application should be denied, we would respectfully urge that the record be reopened for an additional 30-day period during which the parties would be permitted to engage in discovery and offer evidence relating to this issue. We submit that such a brief additional period would not materially affect the P-I, would serve the public interest, and would lead to a just resolution of this proceeding in keeping with the intent of Congress.

despite Hearst's consistent refusal to consider selling the P-I. By rebuffing all inquiries and taking a strong public position that the paper would not be sold under any circumstances, Hearst discouraged serious offers. Hearst's unwillingness to enter into serious negotiations or cooperate with potential buyers of the P-I made it difficult for them to formulate concrete proposals for purchase and future operation of the paper. The fact that qualified purchasers nonetheless continued to come forward is strong and unrebutted evidence of the P-I's saleability.

As Judge Hanscom correctly points out, "There is nothing in the legislative history to suggest that Congress intended to require the owner of a failing newspaper to sell it to others who then might enter a joint operating arrangement as permitted by the Act." Recommended Decision at 92. However, Judge Hanscom concluded that is not the situation here. He found that the P-I probably could be sold to someone "who could, and would, continue it in operation as an independent metropolitan daily." Recommended Decision at 84 (Finding 158). Congress cannot have intended to grant a perpetual antitrust exemption for the purpose of preserving independent editorial voices when that very end could be achieved by the far less drastic means of selling the P-I.

IV. ANTITRUST DIVISION'S EXCEPTIONS TO THE FINDINGS OF FACT OF THE ADMINISTRATIVE LAW JUDGE

This section contains the Antitrust Division's objections and comments to Judge Hanscom's Findings of Fact. We have not noted an exception to each Finding of Fact with which we disagree, but only to those we believe merit review by the Attorney General.

A. Findings 4-8 Are Incomplete And Misleading

These findings present a misleading view of the evidence adduced at the hearing. While there is certainly a national trend toward declining metropolitan daily newspaper competi-

tion, the trend is more pronounced, as expected, when smaller cities are included in the data. Of the 25 largest cities in the United States, including Seattle, 12 continue to have independent and competitive metropolitan daily newspapers. Moreover, the record shows that metropolitan areas that are experiencing significant economic growth are more likely to support metropolitan daily newspaper competition. As noted by Judge Hanscom in Finding 20, Seattle is a large, rapidly-growing metropolitan area. We urge the Attorney General to adopt Antitrust Division's Proposed Findings of Fact 91-117.

Judge Hanscom is incorrect when he states in Finding 5 that one or more newspapers in St. Louis, Miami, Pittsburgh, and Columbus—cities in which joint operating arrangements existed prior to passage of the Act—were "found" to be unlikely to have remained or become financially sound. Only the arrangement in San Francisco has been challenged and found to meet this test of failure.

B. Finding 18 Is Not A Finding Of Fact

The last portion of Finding 18 is a legal conclusion concerning the interpretation of the phrase "in probable danger of financial failure." The authorities cited for this portion of the Finding are two expert witnesses who are not competent to testify concerning interpretation of the Newspaper Preservation Act. This portion of Finding 18 should be rejected.

C. Findings 24-58 Are Misleading

These findings are misleading when the record in this proceeding is viewed as a whole. They consider the competition between the Seattle Times and the P-I and ignore competition between these newspapers and other media (including suburban newspapers). Judge Hanscom notes in Finding 9 that television has been the number one cause of the financial troubles of metropolitan daily newspapers. He fails to point out, however, that television is not a growing factor in assessing the likelihood that a newspaper will succeed or fail (Rosse

523-33) and, in any event, the impact of television affects an afternoon newspaper (such as the Seattle Times) more than a morning newspaper (Morton 188). We urge the Attorney General to reject these findings.

D. Finding 93 Is Incorrect In Part

We take exception to the final sentence of Finding 93, which states: "To adjust the Post-Intelligencer's financial statements to eliminate depreciation as an expense so as to reduce the magnitude of its annual losses from 1969 to 1981 would be unwarranted and inappropriate." In determining whether a newspaper is a failing newspaper, the finder of fact must determine whether it is likely to close. *See* Section II. A. *supra*. Depreciation represents an allocation of past capital expenditures. It is not a cost that can be eliminated by closing the newspaper. Although necessary future capital expenditures are relevant to the decision to close a newspaper, depreciation of past capital expenditures is not relevant.

We urge the Attorney General not to adopt the final sentence of Finding 60. Antitrust Division's Proposed Findings of Fact 61-63 should be adopted instead.

E. Findings 110-12 Should Be Rejected

As noted at page 25, n. 16 *supra*, the five-year projection prepared by Hearst for purposes of this litigation is inherently unreliable and must be rejected. Judge Hanscom ignores the earlier, more optimistic projections of Hearst executives. *See, e.g.*, GX 1D. We urge the Attorney General not to adopt these Findings because they are not supported by the record as a whole.

F. Findings 140-42 Are Incomplete And Misleading

We strongly disagree with Judge Hanscom's implication that the "morning advantage" does not work to the benefit of the P-I. The record inexorably leads to the conclusion that there is a national trend in favor of morning newspapers and

that the factors that have created this trend apply in Seattle to the benefit of the P-I. Hearst's expert, Mr. Morton, testified that the P-I has a morning advantage in Seattle. Morton 271-72, 378-79. With the exception of Seattle, in all cities in the West Coast time zone the morning newspaper is the largest newspaper. Morton 378.

That the Seattle economy has rapidly changed from a predominately manufacturing economy to a service economy, with service-oriented jobs now accounting for about 80 percent of the area's employment (Morton 233-34), is also significant in this regard. Generally, service economies favor a morning newspaper; the changeover in Seattle, however, has been so rapid that the P-I has not yet taken advantage of it. Morton 170-71, 234, 273.

The record does not support the statement in Finding 142 that the Seattle Times will capitalize on the morning advantage. Only a small portion of its daily circulation is distributed in the morning. The P-I is the largest morning newspaper in the State of Washington. Judge Hanscom does not explain how the morning advantage will benefit the afternoon Times if it shifts more of its circulation to the morning, but will not assist the P-I, which publishes exclusively in the morning.

We urge the Attorney General to reject Judge Hanscom's Findings 140-42 and to adopt Antitrust Division Proposed Findings of Fact 118-32.

IV. CONCLUSION

In this proceeding the Attorney General is being asked to approve not merely a limited, technical departure from the usual norms of business behavior, but a permanent license to engage in what could otherwise be serious antitrust violations. The joint operating agreement between Seattle Times Company and The Hearst Corporation provides for price fixing, market allocation, and other restraints of trade. Absent the exemption conferred by the Newspaper Preservation Act, and assuming the failing company defense did not apply, such an

agreement would be a *per se* violation of Section 1 of the Sherman Act. *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 135-36 (1969). The agreement has an initial term of fifty years and can be extended indefinitely. Once granted, an antitrust exemption under the Newspaper Preservation Act is perpetual. The Act contains no provision for the review or revocation of an exemption.

The Supreme Court has "long recognized that the antitrust laws represent a fundamental national economic policy," *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218 (1966), exceptions to which are not lightly to be assumed or broadly construed. *See, e.g., Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979).

The Administrative Law Judge's Recommended Decision, which adopts the broadest possible reading of the exemption, directly contravenes this basic principle of statutory construction. The Administrative Law Judge's interpretation of the Act, if adopted by the Attorney General, would extend the scope of this antitrust exemption far beyond what is necessary to achieve the underlying congressional purpose of preserving independent editorial voices. It would grant an unnecessary windfall to the Applicants and impose an unnecessary burden upon newspaper readers and advertisers.

Even more important than its effect in this proceeding is the impact the Administrative Law Judge's interpretation of the Act would have on the future of newspaper competition in this country. If paper losses on past financial statements alone are enough to qualify a newspaper as failing, even though it returns a net benefit to its owner and is thus unlikely to cease publication, and even though there are qualified purchasers willing and able to continue publishing the paper as a commercially-independent enterprise, there will be strong incentives for competitive newspapers to seek joint operating arrangements as an alternative to the pressures of competition, even if there is no serious danger of shutting down. Congress cannot be presumed to have intended the Act to be

used to destroy commercial newspaper competition unnecessarily.

The Administrative Law Judge fundamentally misperceived the nature and purpose of the Newspaper Preservation Act and applied incorrect standards in concluding that the Seattle Post-Intelligencer is a failing newspaper. The correct standards, as applied to the facts of this case, require rejection of his recommendation and denial of the application.

Respectfully submitted,

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/s/ WILLIAM F. BAXTER
William F. Baxter
Assistant Attorney General

Dated: February 16, 1982

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

C82-730

COMMITTEE FOR AN INDEPENDENT P-I, a corporation; PEOPLE OPPOSED TO A ONE-NEWSPAPER TOWN, an association; COMMITTEE FOR A FREE PRESS, an association; LONGVIEW PUBLISHING COMPANY, a corporation; ROBINSON COMMUNICATIONS, INC., a corporation; VALLEY PUBLISHING COMPANY, a corporation; and NORTHSHORE PUBLISHING COMPANY, a corporation,

Plaintiffs,

v.

WILLIAM FRENCH SMITH, Attorney General of the United States; THE HEARST CORPORATION, a corporation; and SEATTLE TIMES COMPANY, a corporation,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

Plaintiffs allege:

NATURE OF CLAIM

1. This action seeks judicial review of an order issued by the Attorney General of the United States under the Newspaper Preservation Act (hereinafter "the statute"), 15 U.S.C. § 1801 *et seq*. The order would authorize The Hearst Corporation (hereinafter "Hearst") and Seattle Times Company (hereinafter "Times") to engage in conduct which otherwise would violate the Sherman Act, 15 U.S.C. §§ 1 and 2, and to end daily newspaper competition in Seattle, by carrying out the provisions of a proposed joint operating arrangement between them. The order was issued on June 15, 1982, and by its terms will become effective on June 25, 1982, unless its effective date is postponed by an order of this court. Plaintiffs allege

that the said administrative order is unlawful in that it has been issued in violation of the statute, and in that the statute itself is unconstitutional under the First Amendment both as applied herein and on its face. Judgment is sought against the Attorney General declaring the said order unlawful and enjoining him from proceeding further thereunder. No relief is sought against the other defendants, and they are named herein solely because their joinder is appropriate under the provisions of Rule 19(a)(2), Federal Rules of Civil Procedure.

JURISDICTION AND VENUE

2. This Court has jurisdiction herein under the provisions of 28 U.S.C. § 1331 (civil actions arising under the Constitution, laws, or treaties of the United States), and 5 U.S.C. §§ 702, 703 (judicial review of federal agency actions).

3. The plaintiffs are residents of this judicial district. The two daily newspapers involved in the Attorney General's order which is the subject matter of this action are published in Seattle, Washington, and, by direction of the Attorney General, the administrative hearing which preceded the issuance of his order was conducted in Seattle. Defendants Hearst and Times maintain offices and transact business in this district. Venue is properly laid in this district under the provisions of 28 U.S.C. § 1391(e).

THE PARTIES

4. The plaintiffs are the parties who were authorized by the Attorney General to be intervenors in the aforesaid hearing on the application of defendants Hearst and Times for approval by him of their proposed joint operating arrangement. The plaintiffs thereby became parties to the proceeding, with all of the same rights as the existing parties (the applicants and the Assistant Attorney General in Charge of the Antitrust Division), under the provisions of 28 C.F.R. § 48.11(e).

5. Plaintiff Committee for An Independent P-I is a corporation whose members are employees of the Seattle Post-Intelligencer ("P-I"), the daily newspaper published by defendant Hearst in Seattle, Washington. Plaintiff People Opposed to a One-Newspaper Town is an association whose members include journalists, advertisers, publishers, subscribers to the existing Seattle daily newspapers, and other citizens. Plaintiff Committee for a Free Press is an association whose members consist primarily of advertisers in Seattle's two daily newspapers. Plaintiffs Longview Publishing Company, Robinson Communications, Inc., Valley Publishing Company (sometimes called the "Fournier Newspapers"), and Northshore Publishing Company are corporations which publish comparatively small newspapers in neighborhoods or suburbs of the Seattle area.

6. All plaintiffs will be severely and irreparably injured if the administrative order challenged herein is not stayed and vacated. All plaintiffs have been designated by the Attorney General as parties whose interests will be affected by his decision. Implementation of the said defendant's order would cause the immediate loss of at least two hundred jobs; would permit the defendants Hearst and Times to engage in price-fixing, concerted allocation of markets, fixed-formula profit pooling, and other conduct prohibited by the Sherman Act which would injure smaller competitors and advertisers; would permit the said defendants to monopolize the daily newspaper business in Seattle; would remove commercial competition as an impetus for editorial quality and diversity in the city's daily newspapers; and would have other direct and severe adverse effects upon plaintiffs and the public. Although the Antitrust Division of the Department of Justice opposed the issuance of the said order, and advised the Attorney General that it would be contrary to law, the Assistant Attorney General in charge of that Division is not in a position to commence suit against the Attorney General. Accordingly, judicial review of the said order can be obtained only through an action brought by these plaintiffs.

7. Defendant William French Smith (herein called "the Attorney General") is the Attorney General of the United States.

8. Defendant Hearst is a corporation engaged in many parts of the United States in the businesses of publishing newspapers, magazines, and books; owning and operating radio and television broadcasting stations; owning and operating paper mills and various real estate enterprises; and in other businesses. The said corporation is owned entirely by family trusts established under the will of the late William Randolph Hearst.

9. Defendant Times is a corporation engaged in the business of owning and operating a metropolitan daily newspaper in Seattle, Washington. It is owned primarily by the Knight-Ridder organization, a newspaper chain proprietor, and by the Blethen family of Seattle.

THE ADMINISTRATIVE PROCEEDINGS

10. The aforesaid statute, 15 U.S.C. § 1801 *et seq.*, empowers the Attorney General to grant or deny applications by newspaper proprietors for approval of proposed joint operating arrangements between them. In order to grant such an application, the Attorney General must first determine that "not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose" of the statute. A "failing newspaper" is defined as "a newspaper publication which, regardless of ownership or affiliations, is in probable danger of financial failure." If the Attorney General approves the application, the applicant proprietors are thereby exempted from the antitrust laws for purposes of entering, performing, and enforcing the joint operating arrangement.

11. The Seattle Post-Intelligencer (the "P-I") has been published continuously as a daily newspaper in Seattle for more than one hundred years. For approximately the past

sixty years, the P-I has been owned and operated by defendant Hearst.

12. The Seattle Times has been published continuously as a daily newspaper in Seattle for more than eighty-five years. For many years it has been owned and operated by defendant Times.

13. The Times and P-I are now, and for many years have been, the only two metropolitan daily newspapers in Seattle, and are in full commercial and editorial competition with each other.

14. Intermittently from 1952 through 1980, defendants Hearst and Times negotiated with each other to bring about an end to daily newspaper competition in Seattle. From and after 1972, the negotiations concerned a possible joint operating arrangement under the aforesaid statute.

15. On March 27, 1981, defendants Hearst and Times applied to the Attorney General for approval of a proposed joint operating arrangement between the Times and P-I. The proposed arrangement includes the following features:

(a) It is for a term of fifty years with automatic ten-year renewals thereafter;

(b) It contains no provision for termination unless the venture proves unprofitable for three successive years, and thus amounts to a practically irreversible combination of the two major competitors in the market;

(c) It places control of the commercial operation of both newspapers in the hands of defendant Times, including rate-setting, establishment of combination rates, circulation rates and areas, advertising sales, establishment of zoned editions, promotion, and production, leaving separate only the P-I's editorial department, and eliminates all commercial competition between the two newspapers and permits them to act concertedly through a management committee established by their agreement;

(d) It allocates markets by eliminating the P-I's Sunday edition, withdrawing the Times's Monday through Friday morning editions, and establishing exclusive publication hours for each participant, and

(e) It allocates to each party a flat percentage of total combined earnings (approximately one-third to Hearst and two-thirds to Times), regardless of their individual circulations or advertising sales, thus placing Hearst in the position of being able to enhance its profits by minimizing its editorial expenditures.

16. On August 7, 1981, the Attorney General ordered that a hearing be held in connection with the application. On September 29, 1981, the Assistant Attorney General for Administration selected an Administrative Law Judge to act as the hearing examiner under the provisions of 28 C.F.R. § 48.10. On September 30, 1981, the Attorney General ruled that plaintiffs herein could become parties to the hearing as intervenors. A hearing was held at Seattle from November 2, 1981, through November 25, 1981. Following the hearing, the Assistant Attorney General in Charge of the Antitrust Division and the intervenors recommended that the Attorney General deny the application; the applicants recommended that he grant it; the Administrative Law Judge thereafter recommended that he grant it; and the Attorney General, who is not bound by any of the recommendations, issued on June 15, 1982, an order granting the application, to become effective ten days thereafter.

VIOLATIONS OF LAW IN ISSUANCE OF ADMINISTRATIVE ORDER

17. The defendant Attorney General acted in violation of the aforesaid statute, 15 U.S.C. § 1801 *et seq.*, and his order of June 15, 1982, is accordingly invalid, in the following respects:

(a) The Administrative Law Judge has found that the P-I "could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily." That finding requires de-

nial of the application because an extraordinary exemption from the antitrust laws cannot be granted where the alternative of a sale to a qualified buyer who will carry on full-scale competition is available. The Attorney General's refusal to adopt that finding of the Administrative Law Judge, while adopting all of his other findings, is unsupportable.

(b) Where, as here, the record shows that the owner of the applicant newspaper has never considered closing it, has regarded its financial condition as marginal, has expected early profitability, has mismanaged the newspaper in the judgment of many of its own executives and employees, has rebuffed all would-be purchasers by telling them that the newspaper is not for sale, and is operating in a market which can support competition, the newspaper is not "failing" within the meaning of the statute.

(c) The statute recites, 15 U.S.C. § 1801, that its purpose is "to preserve the publication of newspapers . . ." The statutory requirement that the Attorney General determine that approval of the application "would effectuate the policy and purpose" of the Act cannot be met where, as here, implementation of the joint operating arrangement and anti-competitive practices planned thereunder would injure and impair the editorial voices of smaller newspapers in the market, and where the terms of the joint arrangement are unnecessarily anti-competitive and go far beyond anything which could arguably be necessary to continue the publication of both Seattle metropolitan dailies.

18. The Attorney General's aforesaid order is further unlawful and invalid because the statute under which it was issued, 15 U.S.C. § 1801 *et seq.*, violates the First Amendment guaranty that "Congress shall make no law . . . abridging the freedom of speech, or of the press" in the following respects:

(a) Seattle is not a two-newspaper city; rather, as found by the Administrative Law Judge, several other newspapers in the Seattle area, including those of the suburban publisher plaintiffs, must compete with both the Times and the

P-I. The Attorney General's order would in effect grant a license to the two largest newspapers in the market to engage in collusive conduct which is forbidden under the Sherman Act to all of the other newspapers in the market. The applicants would thereby obtain a federally-licensed competitive advantage over each of the smaller newspapers. As a result the latter would be injured and their editorial voices weakened or silenced. The government cannot constitutionally issue such a license in light of the First Amendment. The statute is thus unconstitutional as applied herein.

(b) The statute delegates licensing power to an official of the executive branch under a vague and overbroad standard. The statutory words "probable danger of financial failure" and "effectuate the policy and purpose of this chapter" fail to provide sufficiently clear and precise standards for administrative action in granting antitrust exemptions to some newspaper proprietors while denying them to others. This vague delegation of power to an executive branch official in an area affecting the exercise of freedom of the press violates the First Amendment. The statute is thus unconstitutional on its face.

19. All of the foregoing grounds of illegality under the statute and the Constitution were timely asserted by plaintiffs during the administrative proceedings.

DECLARATORY AND INJUNCTIVE RELIEF NECESSARY

20. An actual controversy exists between plaintiffs and defendant Attorney General, and a declaratory judgment is necessary to determine the legality or illegality of the defendant's aforesaid order. Plaintiffs are threatened with immediate and irreparable harm unless the effective date of said order is postponed pending judicial review. Conditions and circumstances exist which would constrain a court of equity, under rules governing such proceedings, to grant permanent injunctive relief against said defendant.

PRAYER

Wherefore, plaintiffs pray judgment against defendant Attorney General as follows:

(1) That the Court issue its preliminary order under the provisions of 5 U.S.C. § 705 postponing the effective date of the Attorney General's order of June 15, 1982, until the entry of judgment herein;

(2) That the Court enter judgment declaring the aforesaid order to be unlawful and unconstitutional in the respects specified above, and enjoining said defendant from proceeding further thereunder; and

(3) That plaintiffs be awarded their costs of suit and such other and further relief as the Court may deem just.

DATED: June 15, 1982.

CULP, DWYER, GUTERSON & GRADER

By /s/ WILLIAM L. DWYER

William L. Dwyer
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

C82-730R

COMMITTEE FOR AN INDEPENDENT P-I, a corporation, *et al.*,
Plaintiffs,

v.

WILLIAM FRENCH SMITH, Attorney General of the United States, *et al.*,
Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR ORDER POSTPONING EFFECTIVE DATE OF AGENCY ACTION

THIS MATTER comes before the court upon plaintiffs' motion for an order postponing the effective date of the United States Attorney General's order of June 15, 1982, granting the application of the Hearst Corporation (Hearst) and the Seattle Times Company (Times) for approval of a proposed joint operating agreement (JOA) between the Times and the Hearst-owned Seattle Post-Intelligencer (P-I). Plaintiffs' motion is made pursuant to provisions of Section 10(d) of the Administrative Procedure Act (APA), 5 U.S.C. § 705.[1] Having reviewed the motion, memoranda, exhibits and affidavits and having carefully considered the arguments of counsel, the court finds and rules as follows:

The JOA application was filed March 27, 1981, under the Newspaper Preservation Act of 1970, 15 U.S.C. § 1801 *et seq.*,

[1] The APA, 5 U.S.C. § 702, provides that any person adversely affected or suffering a legal wrong because of agency action is entitled to judicial review. Under 5 U.S.C. § 705, the reviewing court is specifically authorized to postpone the effective date of an agency action pending the completion of judicial review.

which establishes a limited exemption under the antitrust laws for joint newspaper operating arrangements which receive the prior written consent of the Attorney General. On August 7, 1981, the Attorney General ordered that an expedited hearing be held in Seattle to resolve factual issues raised by the application. At the close of the hearing, Administrative Law Judge Daniel H. Hanscom (ALJ) recommended that the Attorney General approve the proposed JOA. The Antitrust Division of the Department of Justice opposed the application, but the Attorney General adopted nearly all of the proposed findings of the ALJ.

The effective date of the Attorney General's order is June 25, 1982. Plaintiffs seek a preliminary order postponing that date until judgment is entered in this judicial review action. Both parties agree that the factors to be considered in the court's exercise of discretion under 5 U.S.C. § 705 are generally the same as those used under Rule 65 for preliminary injunctions.

> A formulation that has become popular in all kinds of cases, although it was originally devised in connection with stays of administrative orders, is that the four most important factors are:
>
> (1) The significance of the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.

11 Wright & Miller, Federal Practice and Procedure, § 2948, pp. 430-31.

Defendants stress that regardless of the harm claimed by plaintiffs, they must establish a fair chance of success on the merits. The court finds that plaintiffs have done so. Leaving aside the question of plaintiffs' constitutional claims, plaintiffs assert that the Attorney General's order is contrary to the law. The court cannot help but be mindful that this is the first time in the history of the Newspaper Preservation Act that the

Antitrust Division of the Department of Justice has opposed an application. The Assistant Attorney General in charge of the Antitrust Division advised the Attorney General that the ALJ "fundamentally misperceived the nature and purpose of the Newspaper Preservation Act and applied incorrect standards in concluding that the Seattle Post-Intelligencer is a failing newspaper." Plaintiffs have sufficiently marshaled particular findings and conclusions of the ALJ which, in light of the statute, raise serious questions of whether the correct legal standards have been applied to the facts in this case.

The parties agree that implementation of the Attorney General's order would require the dismantling of the P-I's advertising, circulation and production departments. If plaintiffs prevail on the merits, it would be, at best, difficult for the P-I to reconstitute itself as an independent newspaper. If the P-I's saleability to any of the buyers who now seek to acquire it were impaired by the events, the purpose of judicial review would be frustrated. Furthermore, according to plaintiffs, implementation of the JOA would cause the immediate loss of at least 200 jobs and force many of the P-I employees terminated under the JOA to seek jobs outside the Seattle area.

When the court balances the foregoing factors against the inconvenience and cost to the newspaper defendants caused by the delay in implementing the JOA, it finds that the balance of hardship tips in favor of plaintiffs. The court's review of the Attorney General's order will be done upon summary judgment motion and the court is confident that its review will be complete within approximately sixty days. This amount of time could have easily transpired before the Attorney General's order was issued. Such a delay does not substantially change a situation Hearst and the Times could have reasonably foreseen. The burden on defendants imposed by continuing to operate independently for the time it will take the court to decide this case does not outweigh the hardships posed to the plaintiffs if the postponement is denied.

The court also must take into consideration the fact that the Antitrust Division found that the ALJ's decision contained not

only legal errors of significance to the Seattle application, but "an erroneous precedent for future proceedings under the Act". The strong public interest, both national as well as local, in meaningful enforcement of the antitrust laws recommends the postponement of the effective date of the Attorney General's order while this court determines if the approval of defendants' JOA is legally correct.

Plaintiffs' counsel has represented to the court that this entire case has been handled on a *pro bono* basis and that plaintiffs are unable to post a bond. The APA section, authorizing judicial postponement of the effective date of agency action does not contain a bond requirement. 5 U.S.C. § 705. If the court were to require plaintiffs to post a bond in an amount even near that asked by defendants, it is probable that judicial review of this case would be precluded, thereby thwarting the important public interest stated above. Courts have held that security should not be required where it would deny to plaintiffs their right to judicial review of administrative orders. *Natural Resources Defense Council, Inc.* v. *Morton*, 337 F. Supp. 167 (D.D.C. 1971); *City of Williamsport* v. *United States*, 273 F. Supp. 899, 904 (M.D. Pa. 1967).

Additionally, this motion, as granted, does not in fact enjoin defendants Hearst and Times from proceeding to implement the JOA. The court is merely delaying the effective date of a court order which affects their interests. The court is well aware that such delay will be costly to Hearst and the Times, but this effect is a possible result whenever an agency order is postponed in order to allow meaningful judicial review to take place. Since no injunction is being issued, there can be no possibility of "wrongful" injunction and, therefore, defendants are not entitled to demand security. *Puerto Rico* v. *Price Commission*, 342 F. Supp. 1311 (D. Puerto Rico 1972); *Powelton Civic Home Owners Association* v. *H.U.D.*, 284 F. Supp. 809, 814-15 (E.D. Pa. 1968).

Having balanced all the factors, the court will not require plaintiffs to post a bond.

IT IS HEREBY ORDERED that plaintiffs' motion to postpone the effective date of the Attorney General's order is GRANTED, and the new effective date will be August 27, 1982.

DATED this 24th day of June, 1982.

/s/ BARBARA J. ROTHSTEIN

United States District Judge

CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. § 1, ET SEQ.
SHERMAN ACT

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . .

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

15 U.S.C. § 1801 ET SEQ.
NEWSPAPER PRESERVATION ACT

§ 1801. Congressional declaration of policy

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

§ 1802. Definitions

As used in this chapter—

(1) The term "antitrust law" means the Federal Trade Commission Act and each statute defined by section 44 of this title as "Antitrust Acts" and all amendments to such Act and such statutes and any other Acts in pari materia.

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common prodution facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

(3) The term "newspaper owner" mean any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.

(4) The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

(6) The term "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

§ 1803. Antitrust exemption

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: *Provided*, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

§ 1804. Reinstatement of joint operating arrangements previously adjudged unlawful under antitrust laws

(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under section 1803(a) of this title.

(b) The provisions of section 1803 of this title shall apply to the determination of any civil or criminal action pending in any district court of the United States on July 24, 1970, in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

REGULATIONS, 28 C.F.R. PART 48

Chapter 1—Department of Justice

PART 48—NEWSPAPER PRESERVATION ACT

Sec.

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48.16 Procedure for filing of terms of a renewal or amendment to an existing joint newspaper operating arrangement.

AUTHORITY: (28 U.S.C. 509, 510); (5 U.S.C. 301); Newspaper Preservation Act, 84 Stat. 466 (15 U.S.C. 1801 et seq.).

SOURCE: Order No. 558-73, 39 FR 7, Jan. 2, 1974, unless otherwise noted.

§ 48.1 Purpose.

These regulations set forth the procedure by which application may be made to the Attorney General for his approval of joint newspaper operating arrangements entered into after July 24, 1970, and for the filing with the Department of Justice of the terms of a renewal or amendment of existing joint newspaper operating arrangements, as required by the Newspaper Preservation Act, Pub. L. 91-353, 84 Stat. 466, 15 U.S.C. 1801 et seq. The Newspaper Preservation Act does not require that all joint newspaper operating arrangements obtain the prior written consent of the Attorney General. The Act and these regulations provide a method for newspapers to obtain the benefit of a limited exemption from the antitrust laws if they desire to do so. Joint newspaper operating arrangements that are put into effect without the prior written consent of the Attorney General remain fully subject to the antitrust laws.

§ 48.2 Definitions

(a) The term "Attorney General" means the Attorney General of the United States or his delegate, other than the Assistant Attorney General in charge of the Antitrust Division or other employee in the Antitrust Division.

(b) The term "Assistant Attorney General in charge of the Antitrust Division" means the Assistant Attorney General in charge of the Antitrust Division or his delegate.

(c) The term "Assistant Attorney General for Administration" means the Assistant Attorney General for Administration or his delegate.

(d) The term "existing arrangement" means any joint newspaper operating arrangement entered into before July 24, 1970.

(e) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into between two or more newspaper owners for the publication of two or more

newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any of the following: Printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

(f) The term "newspaper" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(g) The term "party" means any individual, and any partnership, corporation, association, or other legal entity.

(h) The term "person" means any individual, and any partnership, corporation, association, or other legal entity.

§ 48.3 Procedure for filing all documents.

All filings required by these regulations shall be accomplished by:

(a) Mailing or delivering five copies of each document (two copies in the case of documents filed by the Assistant Attorney General in charge of the Antitrust Division) to the Assistant Attorney General for Administration, Department of Justice, Washington, D.C. 20530. He shall place one copy in a numbered public docket; one copy in a duplicate of this file for the use of officials with decisional responsibility; and (except in the case of documents filed by the Assistant Attorney General in charge of the Antitrust Division) shall forward three copies to the Assistant Attorney General in charge of the Antitrust

Division; except that documents subject to nondisclosure orders under § 48.5 shall be held under seal and disclosed only in accordance with the provisions of that section; and

(b) Mailing or delivering one copy of each document filed after a hearing has been ordered to each party to the proceedings, along with the name and address of the party filing the document or its counsel, and filing in the manner provided in paragraph (a) of this section a certificate that service has been made in accordance herewith.

§ 48.4 Application for approval of joint newspaper operating arrangement entered into after July 24, 1970.

(a) Persons desiring to obtain the approval of the Attorney General of a joint newspaper operating arrangement after July 24, 1970, shall file an appliation in writing setting forth a short, plain statement of the reasons why the applicants believe that approval should be granted.

(b) With the request, the applicants shall also file copies of the following:

(1) The proposed joint newspaper operating agreement;

(2) Any prior, existing or proposed agreement between any of the newspapers involved, or a statement of any such agreements as have not been reduced to writing;

(3) With respect to each newspaper, for the 5-year period prior to the date of the application,

(i) Annual statements of profit and loss;

(ii) Annual statements of assets and liabilities;

(iii) Reports of the Audit Bureau of Circulation, or statements containing equivalent information;

(iv) Annual advertising lineage records;

(v) Rate cards;

(4) If any amount stated in paragraph (b)(3)(i) or (ii) of this section represents an allocation of revenues, expenses, assets

or liabilities between the newspaper and any parent, subsidiary, division or affiliate, the financial statements shall be accompanied by a full explanation of the method by which each such amount has been allocated.

(5) If any of the newspapers involved purchased or sold goods or services from or to any parent, subsidiary, division or affiliate at any time during the five years preceding the date of application, a statement shall be submitted identifying such products or services, the entity from which they were purchased or to which they were sold, and the amount paid for each product or service during each of the five years.

(6) Any other information which the applicants believe relevant to their request for approval.

(c) A copy of the application and supporting data shall be open to public inspection during normal business hours at the main office of each of the newspapers involved in the arrangement, except to the extent permitted by nondisclosure orders under § 48.5; except that materials for which nondisclosure has been requested under § 48.5 need not be made available for inspection before the request has been decided.

§ 48.5 Requests that information not be made public.

(a) Any applicant may file a request that commercial or financial data required to be filed and made public under these regulations, which is privileged and confidential within the meaning of 5 U.S.C. 552(b), be withheld from public disclosure. Each such request shall be accompanied by a statement of the reasons why nondisclosure is required. The request shall be determined by the Attorney General who shall consider the extent to which (1) disclosure may cause substantial harm to the applicant submitting the information, and (2) nondisclosure may impair the ability of persons who may be adversely affected by the proposed arrangement to present their views in proceedings under these regulations. Information relevant to the financial conditions of the newspaper or newspapers represented to be failing ordinarily shall not be ordered withheld from public disclosure.

(b) Upon ordering that any documents be withheld from public disclosure, the Attorney General shall file a statement setting forth the subject matter of the documents withheld. Any person desiring to inspect the documents may file a request for inspection, identifying with as much particularity as possible the materials to be inspected and setting forth the reasons for inspection and the facts in support thereof. The request for disclosure shall be considered by the Attorney General, who shall give the applicant that submitted the documents an opportunity to be heard in opposition to disclosure. Orders granting inspection shall specify the terms and conditions thereof, including restrictions on disclosure to third parties.

(c) Documents ordered withheld from public disclosure shall be made available to the Assistant Attorney General in charge of the Antitrust Division. If a hearing is held, the documents may be offered as evidence by any party to whom they have been disclosed. The administrative law judge may restrict further disclosure as he deems appropriate, taking into account the considerations set forth in paragraph (a) of this section.

(d) Requests for access to materials within the scope of this section that may be filed after the conclusion of proceedings under these regulations shall be processed in accordance with the Department's regulations under 5 U.S.C. 552 (Part 16 of this chapter).

§ 48.6 Public notice.

(a) Upon the filing of the documents required by § 48.4, the applicants shall file, and publish on the front pages of each of the newspapers for which application is made, daily and Sunday (if a Sunday edition is published) for a period of one week.

(1) Notice that a request for approval of a joint newspaper operating arrangement has been filed with the Attorney General;

(2) Notice that copies of the proposed arrangement, as well as all other documents submitted pursuant to § 48.4, are avail-

able for public inspection at the Department of Justice and at the main offices of the newspapers involved; and

(3) Notice that any person may file written comments or a request for a hearing with the Department of Justice, in accordance with the requirements of § 48.3.

(b) Upon the filing of the notice required in paragraph (a) of this section, the Assistant Attorney General for Administration shall cause notice to be published in the FEDERAL REGISTER, and shall cause to be issued a press release setting forth the information contained therein.

(c) If a hearing is scheduled pursuant to § 48.10, the applicants shall publish the time, date, place and purpose of such hearing on their respective front pages at least three times within the 2-week period after the hearing has been scheduled (two times if the applicants are weekly newspapers), and for the 3 days preceding such hearing (one day during the week preceding the hearing if the applicants are weekly newspapers).

(d) The applicants shall file copies of each day's newspaper in which the notice required in paragraph (a) or paragraph (c) of this section has appeared.

§ 48.7 Report of the Assistant Attorney General in Charge of the Antitrust Division.

(a) The Assistant Attorney General in charge of the Antitrust Division shall, not later than 30 days from the publication in the FEDERAL REGISTER of the notice required by § 48.6, submit to the Attorney General a report on any application filed pursuant to § 48.4. In preparing such report he may require submission by the applicants of any further information which may be relevant to a determination of whether approval of the proposed arrangement is warranted under the Act.

(b) In his report he may state (1) that the proposed arrangement should be approved or disapproved without a

hearing; or (2) that a hearing should be held to resolve material issues of fact.

(c) The report shall be filed, and a copy shall be sent to the applicants. Upon the filing of the report, the Assistant Attorney General for Administration shall cause to be issued a press release setting forth the substance thereof.

(d) Any person may, within 30 days after filing of the report, file a reply to the report for the consideration of the Attorney General.

§ 48.8 Written comments and requests for a hearing.

(a) Any person who believes that the Attorney General should or should not approve a proposed arrangement, may at any time after filing of the application until 30 days after publication in the FEDERAL REGISTER of the notice required in § 48.6

(1) File written comments stating the reasons why approval should or should not be granted, and/or

(2) File a request that a hearing be held on the application. A request for a hearing shall set forth the issues of fact to be determined and the reasons that a hearing is required to determine them.

(b) Any person may within 30 days after the filing of any comment or request pursuant to paragraph (a) of this section, file a reply for the consideration of the Attorney General.

(c) After the expiration of the time for filing of replies in accordance with §§ 48.7 and 48.8 the Attorney General shall either approve or deny approval of the arrangement, in accordance with § 48.14, or shall order that a hearing be held.

§ 48.9 Extensions of time.

Any of the time periods established by these Regulations may be extended for good cause, upon timely application to the Attorney General, or to the adminstrative law judge if one has been appointed.

§ 48.10 Hearings.

(a) Upon the issuance by the Attorney General of an order for a hearing, the Assistant Attorney General for Administration shall appoint an administrative law judge in accordance with section 11 of the Administrative Procedure Act, 5 U.S.C. 3105. The administrative law judge shall:

(1) Set a date, time and place for the hearing convenient for all parties involved. The date set shall be as soon as practicable, allowing time for publication of the notice required in § 48.6 and for a reasonable period of discovery as provided in this section. In setting a place for the hearing, preference shall be given to the community in which the applicants' newspapers operate.

(2) Mail notice of the hearing to the parties, to each person who filed written comments or a request for a hearing, and to any other person he believes may have an interest in the proceeding.

(3) Permit discovery by any party, as provided in the Federal Rules of Civil Procedure; except that he may place such limits as he deems reasonable on the time and manner of taking discovery in order to avoid unnecessary delays in the proceedings.

(4) Conduct a hearing in accordance with section 7 of the Administrative Procedure Act, 5 U.S.C. 556. At such hearing, the burden of proving that the proposed arrangement meets the requirements of the Newspaper Preservation Act will be on the proponents of the arrangement. The rules of evidence which govern civil proceedings in matters not involving trial by jury in the courts of the United States shall apply, but these rules may be relaxed if the ends of justice will be better served in so doing; Provided, that the introduction of irrelevant, immaterial, or unduly repetitious evidence is avoided. Only parties to the proceedings may present evidence, or cross-examine witnesses.

(b) The applicants and the Assistant Attorney General in charge of the Antitrust Division shall be parties in any hearing held hereunder. Other person may intervene as parties as provided in § 48.11.

(c) The Assistant Attorney General for Administration shall procure the services of a stenographic reporter. One copy of the transcript produced shall be placed in the public docket. Additional copies may be purchased from the reporter or, if the arrangement with the reporter permits, from the Department of Justice at its cost.

(d) Following the hearing the administrative law judge shall render to the Attorney General his recommendation that the proposed arrangement be approved or denied approval in accordance with the standards of the Act. The recommendation shall be in writing, shall be based solely on the hearing record, and shall include a statement of the administrative law judge's findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record. Copies of the recommendation shall be filed and sent to each party.

(e) Within 30 days of the date the administrative law judge files his recommendation, any party may file written exceptions to the recommendation for consideration by the Attorney General. Parties shall then have a further 15 days in which to file responses to any such exceptions.

§ 48.11 Intervention in hearings.

(a) Any person may intervene as a party in a hearing held under these regulations if (1) he has an interest which may be affected by the Attorney General's decision, and (2) it appears that his interest may not be adequately represented by existing parties.

(b) Application for intervention shall be made by filing in accordance with § 48.3(a) and (b), within 20 days after a hearing has been ordered, a statement of the nature of the applicant's interest, the way in which it may be affected, the facts and reasons in support thereof and the reasons why the appli-

cant's interest may not be adequately represented by existing parties.

(c) Existing parties may file a statement in opposition to or in support of an application to intervene within 10 days of the filing of the application.

(d) Applications for intervention shall be decided by the Attorney General.

(e) Intervenors shall have the same rights as existing parties in connection with any hearing held under these regulations.

§ 48.12 Ex parte communications.

No person shall communicate on any matter related to these proceedings with the administrative law judge, the Attorney General or anyone having decisional responsibility, except as provided in these regulations.

§ 48.13 Record for decision.

(a) The record on which the Attorney General shall base his decision in the event a hearing is not held shall be comprised of all material filed in accordance with these regulations, including any material that has been ordered withheld from public disclosure.

(b) If a hearing is held, the record on which the Attorney General shall base his decision shall consist exclusively of the hearing record, the examiner's recommendation and any exceptions and responses filed with respect thereto.

§ 48.14 Decision by the Attorney General.

(a) The Attorney General shall decide, on the basis of the record as constituted in accordance with § 48.13, whether approval is warranted under the Act. In rendering his decision, the Attorney General shall file therewith a statement of his findings and conclusions and the reasons therefor, or where a hearing has been held, he may adopt the findings and conclusions of the administrative law judge.

(b) Approval of a proposed arrangement by the Attorney General shall not become effective until the tenth day after the filing of the Attorney General's decision as provided in this section.

§ 48.15 Temporary approval.

(a) If the Attorney General concludes that one or more of the newspapers involved would otherwise fail before the procedures under these regulations can be completed, he may grant temporary approval of whatever form of joint or unified action would be lawful under the Act if performed as part of an approved joint newspaper operating arrangement, and that he concludes is: (1) Essential to the survival of the newspaper or newspapers; and (2) most likely capable of being terminated without impairment to the ability of both newspapers to resume independent operation should final approval eventually be denied.

(b) Upon the filing of a request for temporary approval, the applicants shall publish notice of such application on the front pages of their respective newspapers for a period of three consecutive days in the case of daily newspapers or in the next issue in the case of weekly newspapers. The notice shall state (1) that a request for temporary approval of a joint operating arrangement or other joint or unified action has been made to the Attorney General; and (2) that anyone wishing to protest the application for temporary approval may do so by delivering a statement of protest or telephoning his views to an employee of the Department of Justice, whose name, address and telephone number shall be designated by the Department upon receipt of the application for temporary approval, and that such protests must be received by the Department within five days of the first publication of notice in accordance with paragraph (a) of this section.

(c) The notice required by this section shall be in addition to the notice required by § 48.6.

(d) Such temporary approval may be granted without hearing at any time following the expiration of the period

provided for protests, but shall create no presumption that final approval will be granted.

§ 48.16 Procedure for filing of terms of a renewal or amendment to an existing joint newspaper operating arrangement.

Within 30 days after a renewal of or an amendment to the terms of an existing arrangement, the parties to said renewal or amendment shall file five copies of the agreement of renewal or amendment. In the case of an amendment, the parties shall also file copies of the amended portion of the original agreement.

[Order No. 558-73, 39 FR 7, Jan. 2, 1974, as amended by Order No. 568-74, 39 FR 18646, May 29, 1974]

5 U.S.C. § 706
ADMINISTRATIVE PROCEDURE ACT
SECTION RE SCOPE OF REVIEW

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Office-Supreme Court, U.S.
FILED
SEP 21 1983
L. STEVAS,

No. 83-107

In the Supreme Court of the United States

OCTOBER TERM, 1983

COMMITTEE FOR AN INDEPENDENT P-I, ET AL.,
PETITIONERS

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether in this case the failure of respondent Hearst to consider the possibility of selling its failing newspaper to a new owner precluded approval by the Attorney General of a joint operating arrangement under the Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*

2. Whether the Attorney General's approval of a joint operating arrangement is properly made without regard to the ownership of the failing newspaper.

3. Whether the Newspaper Preservation Act requires the Attorney General to find, in order to approve a joint operating arrangement, that the arrangement would not adversely affect other newspapers in the area and is the least anticompetitive approach possible.

4. Whether the Newspaper Preservation Act violates the First Amendment on the grounds that (a) as applied in this case, it may work to the disadvantage of other newspapers in the area, and (b) on its face, it is vague and overbroad.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-107

COMMITTEE FOR AN INDEPENDENT P-I, ET AL.,
PETITIONERS

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 704 F.2d 467. The opinion of the district court (Pet. App. 33a-51a) is reported at 549 F. Supp. 985.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1983. The petition for a writ of certiorari was filed on July 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*, provides a mechanism to preserve the editorial voices of failing newspapers. Under the Act, the Attorney General is empowered to grant a limited immunity from federal

antitrust laws to newspapers entering into a joint operating arrangement. In order to grant an application for such immunity, the Attorney General must find (a) that one of the applicants is a "failing newspaper," which is defined in the Act as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure" (15 U.S.C. 1802(5)), and (b) that approval of the joint operating arrangement would effectuate the policy and purpose of the Act (15 U.S.C. 1803(b)).

Pursuant to Department of Justice regulations, applications for joint operating arrangements are referred to the Assistant Attorney General in charge of the Antitrust Division, who can recommend either that the arrangement be approved or that a hearing be held before an administrative law judge. 28 C.F.R. 48.7. If a hearing is held, the Antitrust Division becomes a party to the proceeding, and other interested persons may intervene. 28 C.F.R. 48.10(b) and 48.11. Final authority to approve or disapprove the application rests with the Attorney General, whose decision is to be based on the hearing record, the ALJ's recommendation, and any exceptions filed thereto. 28 C.F.R. 48.13(b).

If the Attorney General approves the application, a joint operating arrangement can be undertaken by the newspapers "pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to" a number of commercial activities specified in the Act, including allocation of production facilities, advertising and circulation solicitation and rates, and revenue distribution. 15 U.S.C. 1802(2). However, the Act requires that there be "no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined" (*ibid.*). Under the Act, the Attorney General's approval provides an exemption from the antitrust laws for the joint operating arrangement itself (15 U.S.C.

1803(b)), but does not "exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity" (15 U.S.C. 1803(c)).

2. In March 1981, respondents Seattle Times Company, the owner of the Seattle Times, and the Hearst Corporation, owner of the Seattle Post-Intelligencer ("P-I"), filed an application for approval of a joint operating arrangement covering those two newspapers (Pet. App. 2a). As the Antitrust Division recommended, the Attorney General appointed an administrative law judge to conduct a hearing on the application. The Attorney General also permitted petitioners to intervene in the proceedings in opposition to the application.

After a lengthy hearing, the ALJ recommended that the application be granted (Pet. App. 62a-153a). Based on his analysis of conditions within the newspaper industry in general and the poor financial situation of the P-I in particular, the ALJ concluded that the P-I was caught in a "downward spiral" in which a newspaper's declining circulation and advertising feed on one another and force it into financial failure (*id.* at 120a, 126a, 129a-130a). He found that the P-I had lost money in every year since 1969 and had a cumulative loss of more than $14 million in the period 1969-1980 (*id.* at 92a); in contrast, the Times had been consistently profitable during those years (*id.* at 93a). The ALJ also found that the P-I would likely continue to lose money in the future (*id.* at 114a-115a). The ALJ further concluded that the financial condition of the P-I was not due to any mismanagement by respondent Hearst and that Hearst "did everything [it] could in [its] best judgment to remedy the situation" and "tried urgently * * * to return the Post-Intelligencer to profitability" (*id.* at 106a; see also

id. at 112a, 143a). The ALJ also considered various alternatives for improving the financial condition of the P-I, but found that the "evidence does not support a conclusion that any of these offer the prospect of reversing the Post-Intelligencer's losses" (*id.* at 134a).

In view of "the long-term history of uninterrupted declines in every important category of the Post-Intelligencer's operations" (Pet. App. 129a), the ALJ determined that the P-I "has fallen so far behind, the probability is that its decline is irreversible" (*ibid.*). Furthermore, "the evidence does not establish that new management would be any more successful than Hearst and current management of the Post-Intelligencer in returning it to profitability" (*id.* at 112a). Finally, the ALJ concluded that "[i]f the Post-Intelligencer were a free standing, separate and independent newspaper, not owned by Hearst, the record in this proceeding is sufficient to prove that it would be in probable danger of closure. * * * Were it not for infusions of capital from Hearst, the probabilities are that the Post-Intelligencer would have failed long ago" (*id.* at 139a).

The Attorney General accepted the ALJ's recommendation and approved the application (Pet. App. 53a-61a). In particular, the Attorney General noted the ALJ's findings (*id.* at 57a)

> that the P-I had lost in excess of $14.3 million since 1969, that its competitive share of newspaper circulation and advertising revenue in Seattle had eroded substantially (and continues to decline), and that new management probably could not, based upon the record, return the P-I to profitability * * *.

The Attorney General also noted the ALJ's determinations that the relationship between Hearst and P-I was "generally reasonable and mutually beneficial" (*ibid.*) and "that no allegation of culpable mismanagement could be supported

by the record" (*id.* at 58a). And the Attorney General found that the ALJ's "conclusions both that the new management probably would not improve the P-I's financial prospects and that the P-I is a 'failing newspaper' under the Act are amply supported by the record" (*id.* at 60a n.*). Accordingly, the Attorney General adopted all of the findings and conclusions of the ALJ with the exception of Finding No. 158 (*id.* at 55a-56a), in which the ALJ had found that the P-I could "in all probability be sold at fair market value" (*id.* at 136a); the Attorney General concluded there was no evidentiary support in the administrative record for this finding (*id.* at 56a, 60a n.*).

3. Following the Attorney General's determination, petitioners filed this action in the United States District Court for the Western District of Washington to enjoin the joint operating arrangement. The district court overturned the Attorney General's decision on the ground that his ruling regarding Finding No. 158, concerning possible sale of the P-I, was arbitrary and capricious (Pet. App. 40a). In the court's view, "[w]here the record establishes that there are competent businessmen ready and willing to tackle the management problems of the P-I, the burden of proof rests upon the applicants for the [joint operating arrangement] to demonstrate that the new owners could not make the P-I succeed" (*id.* at 45a-46a). Since Hearst had generally indicated that the P-I was not for sale (*id.* at 41a), "[t]here has been no fair opportunity for prospective buyers to prepare and present their plans to make the P-I profitable" (*id.* at 46a). Thus, the court reversed the Attorney General's approval of the joint operating arrangement because "there are ready and willing buyers who present[ed] themselves" and Hearst had not "carr[ied] the burden of demonstrating that none of those buyers could continue to operate the P-I as an independent daily" (*ibid.*).

Although it set aside the Attorney General's decision on this ground, the district court rejected petitioners' other challenges to the approval of the joint operating arrangement. The court held that the evidence in the record supports the conclusion that the P-I probably could not have continued to exist without Hearst's backing (Pet. App. 46a-47a) and that the "findings and conclusions regarding the P-I's financial condition must stand" (*id.* at 47a). The court also ruled, contrary to petitioners' contentions, that the Attorney General was not required to examine possible injury to competing newspapers from the joint operating arrangement or to determine that the arrangement is the least restrictive alternative possible (*id.* at 47a-48a). Finally, the court ruled that the Newspaper Preservation Act does not violate the First Amendment, concluding that the limited antitrust exemption offered by the Act does not license or regulate the content of speech, that any harm to other newspapers from the joint operating arrangement was speculative, and that the Act is not overbroad or vague (*id.* at 48a-50a).

4. The court of appeals reversed the judgment of the district court and reinstated the Attorney General's approval of the joint operating arrangement (Pet. App. 1a-30a). The court first ruled that the Attorney General had correctly declined to adopt Finding No. 158 on the possible sale of the P-I (*id.* at 13a-15a). In addition, the court held that while there is no per se requirement that an attempt to sell the newspaper be made in order to prove that reasonable alternatives to the joint operating arrangement do not exist (*id.* at 15a), "proof of interested purchasers is [not] irrelevant" (*ibid.*). Rather, "[t]he existence of interested buyers may be relevant to th[e] determination" whether "the newspaper [is] suffering losses which more than likely cannot be reversed[.] * * * Also, poor management practices * * * may show that, with managerial improvement, the paper's

economic problems can be overcome" (*id.* at 19a). Thus, " 'alternatives' to a [joint operating arrangement] are relevant to both the causes of a newspaper's financial decline and its future prospects" (*id.* at 20a).

Turning to the "critical question * * * whether it was shown that the P-I's financial condition was such that new management might be successful in reversing the P-I's difficulties" (Pet. App. 20a), the court found that "[t]here is sufficient evidence in the record supporting a negative answer" (*ibid.*). In particular, after reviewing the relevant evidence and findings (*id.* at 20a-21a), the court upheld the determination that new management would not likely be any more successful than Hearst in achieving profitability for the P-I (*id.* at 21a). And given "the absence of a showing that there is a likelihood new management would succeed, Hearst's failure to consider purchase inquiries lost importance" (*ibid.*). Accordingly, the court held that "[w]hen the proponents of the [joint operating arrangement] established, as they did here, that the paper was managed reasonably and its trend toward failure is irreversible *under any management*, we have no difficulty concluding that the burden of proof has been met" (*id.* at 22a (emphasis in original)).

In addition, the court of appeals agreed with the district court that petitioners' other attacks upon the Attorney General's approval of the joint operating arrangement were without merit. The court held that it was sufficient for Hearst to show that the P-I was "in dire financial trouble" and "would probably be closed" "but for the ownership of Hearst" (Pet. App. 23a). The court rejected petitioners' argument that Hearst also was required to demonstrate that it would not continue to publish the P-I if the joint operating arrangement were disapproved, finding that the Act —which defines a "failing newspaper" as one that, "*regardless of its ownership or affiliations*, is in probable danger of

financial failure" (15 U.S.C. 1802(5) (emphasis added)) — intended "that the ailing newspaper should be analyzed as a free-standing entity, as if it were not owned by a corporate parent. * * * [G]enerally, ownership is not to be a factor in considering whether a newspaper is failing" (Pet. App. 24a, 25a). Thus, Hearst had only to prove, as it did, that the "P-I, as a separate entity, is in severe financial trouble and would likely close if not owned by Hearst" (*id.* at 25a).

The court of appeals also agreed with the district court that the Attorney General was not required either to analyze the potential impact of a proposed joint operating arrangement on other newspapers in the market or to limit the arrangement to the least anticompetitive approach possible (Pet. App. 25a-28a). The court concluded that Congress had itself considered the impact the Act might have on other newspapers and had made "a policy determination that the preservation of editorial diversity through joint operating arrangements outweighs any potentially anticompetitive effects this antitrust exemption might cause. * * * Congress considered the question of harm to other newspapers and resolved it in favor of the antitrust exemption" (*id.* at 26a). In addition, the court found no merit to petitioners' argument that the joint operating arrangement at issue here would not effectuate the policy and purpose of the Act (*id.* at 27a).

Finally, the court of appeals agreed with the district court that, while petitioners' First Amendment claims "are imaginative, they lack substantial merit" (Pet. App. 28a). The court ruled that the Act — which is designed to promote and aid the press —neither affects the content of speech nor discriminates among newspapers. Thus, the court found that the Act, in modifying the scope of the antitrust laws, is similar to other economic regulatory statutes applicable to the newspaper industry that have been held to be valid (*id.* at 28a-29a). In addition, the court held

that, since the Attorney General is required to base his decision regarding a proposed joint operating arrangement on the policies and requirements specified in the Act, the Act contains no vague or overbroad delegation of power (*id.* 29a-30a).

ARGUMENT

Petitioners acknowledge (Pet. 2-3, 5), as the court of appeals observed (Pet. App. 2a), that the issues of interpretation under the Newspaper Preservation Act are ones of first impression and that the decision below does not conflict with any decision of this Court or the other courts of appeals. Furthermore, the decision upholding approval of the joint operating arrangement turns on a combination of factual determinations that are adequately established in the record and constructions of the Newspaper Preservation Act that (with one exception, where the district court disagreed) the ALJ, the Attorney General, the district court, and the court of appeals have unanimously adopted contrary to petitioners' contentions. Finally, petitioners' First Amendment arguments have been consistently rejected at all levels of this case as well as in the other cases that have considered them. Accordingly, further review is not warranted.

1. Petitioners first argue (Pet. 9-16) that, in order for the proposed joint operating arrangement to be approved, respondent Hearst could not decline to deal with prospective purchasers of the P-I. In their view, "[t]he correct rule is that where qualified buyers come forward, the applicant-owner must be willing to consider a sale so as to permit the new ownership alternative to be explored. If the owner refuses to do that — as Hearst did here — the applicants' burden of negating the availability of competition-preserving alternatives cannot be met" (Pet. 15).[1]

[1]It is unclear whether petitioners contend that the failure to consider the sale of the newspaper creates a rebuttable presumption against the joint operating arrangement — as the district court seemed to hold (see Pet. App. 46a) — or an absolute bar to approval of the arrangement.

This interpretation of the statute is unfounded. Petitioners have pointed to nothing in the text or history of the Act that imposes a requirement to sell, or to attempt to sell, a failing newspaper. Moreover, such a precondition to the approval of a joint operating arrangement would largely resurrect the "failing company doctrine" applied in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 137-138 (1969) — a doctrine that, as the court of appeals (Pet. App. 9a-12a, 15a) correctly observed, the Newspaper Preservation Act was expressly designed to supersede. Thus, the Attorney General (*id.* at 59a-60a)[2] and the court of appeals (*id.* at 15a) correctly concluded that there is no per se sale requirement in the Act.[3]

To be sure, as the Attorney General (Pet. App. 60a n.*) and the court of appeals (*id.* at 19a-20a) recognized, the existence of interested potential purchasers may be relevant to the issues whether and for what reasons the newspaper is suffering financial losses that are not likely to be reversed. For example, the presence of prospective buyers might indicate that the economic prospects for the paper are not as unpromising as the current owner believes. It also might

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[2]Because the Attorney General is charged with administration of the Act, his views are entitled to great deference. See *Howe* v. *Smith*, 452 U.S. 473, 485 (1981); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

[3]Petitioners also rely (Pet. 10-11) on the standards of the Bank Merger Act (12 U.S.C. 1828) as applied in *United States* v. *Third National Bank*, 390 U.S. 171 (1968), which, they contend, Congress intended to incorporate into the Newspaper Preservation Act. Whatever the general applicability of Bank Merger Act principles in this context, it suffices here to note that they can be satisfied by a demonstration that those seeking to merge "made reasonable efforts to solve the management dilemma of * * * [the bank] short of merger with a major competitor but failed in these attempts, *or that such efforts would have been unlikely to succeed*" (*United States* v. *Third National Bank*, *supra*, 390 U.S. at 189 (emphasis added)). As discussed below, the record in this case establishes that new management would not likely have been able to rectify the financial problems of the Post-Intelligencer.

indicate that the newpaper's difficulties are due to mismanagement and could be cured by a new owner. In this way, the sale of the P-I as an "alternative[] to a [joint operating agreement is] relevant to the determination that * * * [the] newspaper qualifies under the Act" (*id.* at 13a).

On this question, however, "Hearst met its burden of showing that the alleged alternatives did not offer a solution to the P-I's difficulties" (Pet. App. 13a). As the court of appeals discussed (*id.* at 3a, 5a-6a, 20a) and as we have summarized above (see pages 3-4, 7, *supra*), the record amply shows that the P-I's "trend toward failure is irreversible *under any management*" (Pet. App. 22a (emphasis in original)) and that new management would not likely be successful in improving its financial condition. In these circumstances, "Hearst's failure to consider purchase inquiries lost importance" (*id.* at 21a) with respect to the critical question under the Act —whether the P-I was in probable danger of financial failure. Accordingly, the Attorney General's approval of the joint operating arrangement was not improper.

2. Petitioners next assert (Pet. 16-20) that the Act requires Hearst, as the parent corporation of the P-I, to demonstrate that it would close the newspaper in the event the joint operating arrangement were not approved. This contention was rejected by the ALJ, the Attorney General, the district court, and the court of appeals.

By its terms, the Act provides that the financial prospects of an ailing newspaper are to be considered "regardless of its ownership or affiliations" (15 U.S.C. 1802(5)). In addition, as the court of appeals explained (Pet. App. 24a-25a), the legislative history of the Act also indicates that the newspaper generally should be considered without regard to affiliated enterprises. See, *e.g.*, S. Rep. No. 91-535, 91st Cong., 1st Sess. 5 (1969); 116 Cong. Rec. 2006 (1970)

(remarks of Sen. Hruska). Here, the record amply demonstrates "that the P-I is in dire financial trouble and, without the backing of Hearst, it would probably close" (Pet. App. 23a). Thus, considered without regard to its ownership by Hearst, the P-I is clearly in probable danger of financial failure.[4]

3. Petitoners also claim (Pet. 20-24) that the joint operating arrangement should not have been approved because it would adversely affect other newspapers in the area and is not the least anticompetitive measure possible. Once again, this claim has been unanimously rejected at all stages of the litigation.

As the court of appeals explained, the legislative history of the Act demonstrates that Congress made "a policy determination that the preservation of editorial diversity through joint operating arrangements outweighs any potentially anticompetitive effects this antitrust exemption might cause" (Pet. App. 26a). See, *e.g.*, H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 4 (1970). Moreover, by providing that only certain functions may be combined (15 U.S.C. 1802(2)) and that the joint operation may not engage in any predatory practice or other conduct that "would be unlawful under any antitrust law if engaged in by a single entity" (15 U.S.C. 1803(c)), Congress has balanced the competing interests and specified the preconditions to and extent of an

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[4]Petitioners advert to several factors that they claim show that the P-I is actually in a good position to succeed (Pet. 19). However, the ALJ examined these claims at some length (Pet. App. 80a-94a, 112a-130a) and described them as "Pollyanna-like assertions" that are "little more than hopeful speculation and conjecture, ungrounded in reality" (*id.* at 130a). In addition, petitioners contend (Pet. 18) that certain information based on an accounting analysis of Hearst's overall operations shows that respondent Hearst is benefitting financially from continued operation of the P-I. This argument again ignores the plain wording of the Act, which places the focus on the individual newspaper rather than on its owner.

approved joint operating arrangement. And, in fact, the legislation was passed over the objections — which petitioners essentially reiterate in this lawsuit — that it might result in competitive harm to small or new papers (see Pet. App. 26a) and that it was an unnecessary and unduly broad exemption from the antitrust laws in that, *e.g.*, it imposed no time limits on joint operations (see *id.* at 27a). Since Congress has resolved this policy issue, the Attorney General had no occasion to reconsider the matter in approving the joint operating arrangement here. See *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 50 n.22 (1981).

4. Petitioners lastly contend (Pet. 24-30) that the Newspaper Preservation Act violates the First Amendment because (a) as applied in this case, it allegedly worked to the detriment of other newspapers in the area, and (b) on its face, it represents a vague and overbroad delegation of authority to the Attorney General. These arguments are insubstantial and were correctly rejected both at every stage of this litigation and by the only other courts to consider such claims. See *Bay Guardian Co.* v. *Chronicle Publishing Co.*, 344 F. Supp. 1155 (N.D. Cal. 1972); *Honolulu* v. *Hawaii Newspaper Agency*, 7 Media L. Rep. (BNA) 2495 (D. Hawaii 1981).

a. Petitioners assert that the Newspaper Preservation Act is unconstitutional as "disparate economic regulation which favors some newspapers over others" (Pet. 24). But the Act — which simply provides a limited exemption from antitrust liability and serves "to enhance * * * First Amendment values" by preserving the editorial voice of the failing newspaper (*Buckley* v. *Valeo*, 424 U.S. 1, 93 n.127 (1976)) — does not prefer some newspapers to others. Rather, it provides a generally applicable exemption that is available to all newspapers in probable danger of financial failure. Any effect that this content-neutral statute might conceivably have on other newspapers in the area (see Pet. App. 28a,

48a) is at most an incidental consequence of the modification in the system of antitrust regulation that Congress found appropriate to protect and promote a diversity of editorial views, and as such it does not render the Act unconstitutional.[5]

b. Nor is the Act a vague and overbroad delegation of "discretionary licensing power" to the Attorney General (Pet. 27). First, the Act does not involve a "license" at all in the sense that the term is used in the First Amendment context to mean a system of prior restraint on speech or the press. See, *e.g.*, *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-151 (1969). Plainly, the limited antitrust exemption created by the Act involves no such prior restraint.

Furthermore, as the courts below held, the Act is neither vague nor overbroad. Under the two-part test in the Act, the Attorney General must detemine whether the newspaper is in probable danger of financial failure and, if so, whether approval of the proposed joint operating arrangement would effectuate the policy and purpose of the statute. See 15 U.S.C. 1802(5) and 1803(b). Especially in light of the Act's express declaration of congressional policy to "maintain[] a newspaper press editorially and reportorially independent and competitive * * * [and] to preserve the publication of newspapers [in probable danger of financial

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[5] *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, No. 81-1839 (Mar. 29, 1983), upon which petitioners rely (Pet. 24, 25-26), is not to the contrary. In that case the Court struck down a state statute that imposed a special tax on the press and effectively applied to only a few newspapers (slip op. 1). The Court found that such a statute "burdens rights protected by the First Amendment" (*id.* at 7) because it "created a special tax that applies only to certain publications" (*id.* at 6) and could "operate * * * to check critical comment by the press * * * [in a manner] not unrelated to suppression of expression" (*id.* at 10). In contrast, the Newspaper Preservation Act furthers rather than burdens or suppresses editorial diversity and does not discriminate among newspapers in its applicability.

failure]" (15 U.S.C. 1801), these provisions are well within constitutional bounds. See, *e.g.*, *Arnett* v. *Kennedy*, 416 U.S. 134, 158-162 (1974); *CSC* v. *National Association of Letter Carriers*, 413 U.S. 548, 578-579 (1973); *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983

DOJ-1983-09

FILED
SEP 19 198
ALEXANDER L. STEVAS
CLERK

No. 83-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COMMITTEE FOR AN INDEPENDENT P-I; PEOPLE OPPOSED TO A ONE-NEWSPAPER TOWN; COMMITTEE FOR A FREE PRESS; LONGVIEW PUBLISHING COMPANY; ROBINSON COMMUNICATIONS, INC.; AND NORTHSHORE PUBLISHING COMPANY,

Petitioners,

v.

WILLIAM FRENCH SMITH, Attorney General of the United States; THE HEARST CORPORATION; and SEATTLE TIMES COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS THE HEARST CORPORATION AND SEATTLE TIMES COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. Where it has been established that a newspaper has been managed competently and reasonably and that its trend toward failure is probably irreversible under any management or ownership, does the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (the "Act"), which defines a "failing newspaper" as a newspaper "in probable danger of financial failure," also require the owner of the newspaper to indicate that it is for sale and to explore fully that alternative as a prerequisite to a finding by the Attorney General that the newspaper is a "failing newspaper" entitled to approval of a joint newspaper operating arrangement?

2. Where it has been established that a newspaper's trend toward failure is probably irreversible and that, without the continued substantial financial support of its owner, it would probably close, does the Act also require proof of consideration of plans to close the newspaper if approval by the Attorney General is not obtained?

3. Where the provisions of a joint newspaper operating arrangement are in strict accord with those expressly permitted by the Act, does the Act also require inquiry into any possible future competitive impact of such an arrangement or its provisions?

4. Would a possibility that a joint newspaper operating arrangement might have a future competitive impact on other newspapers in the market require a determination that the Act had been applied so as to violate the First Amendment?

5. Does a facially neutral statute providing for administrative approval of an antitrust law exemption available to all qualifying newspapers create a license or prior restraint violative of the First Amendment?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-107

COMMITTEE FOR AN INDEPENDENT P-I; PEOPLE OPPOSED TO A ONE-NEWSPAPER TOWN; COMMITTEE FOR A FREE PRESS; LONGVIEW PUBLISHING COMPANY; ROBINSON COMMUNICATIONS, INC.; and NORTHSHORE PUBLISHING COMPANY,

Petitioners,

v.

WILLIAM FRENCH SMITH, Attorney General of the United States; THE HEARST CORPORATION; and SEATTLE TIMES COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS THE HEARST CORPORATION AND SEATTLE TIMES COMPANY IN OPPOSITION

Respondents pray that the Court deny the Petition for writ of certiorari.

STATEMENT OF THE CASE

THE PROCEEDINGS BELOW

This case arises out of an Application filed with the Attorney General on March 27, 1981 by Respondents Seattle Times Company and The Hearst Corporation ("Hearst") (sometimes collectively referred to as the "Applicants") for

approval of a joint newspaper operating arrangement ("JOA") involving *The Seattle Times* (the "Times") and the Hearst-owned *Seattle Post-Intelligencer* (the "P-I"), pursuant to the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804, App. 201a-203a (the "Act").[1] Under a JOA, two independently-owned newspapers combine their commercial functions while maintaining separate and independent editorial and reportorial staffs and policies. *See* 15 U.S.C. § 1802(2), App. 201a.

The Application and the issues raised in the Petition have been subjected to four levels of administrative and judicial review. An administrative law judge ("ALJ") presided over a four-week evidentiary hearing and recommended that the Application be approved.[2] App. 153a. The Attorney General approved the Application on June 15, 1982, adopting, with one exception, the recommended findings of fact and legal conclusions of the ALJ. App. 61a. Petitioners then brought this action in the District Court for the Western District of Washington, which, while leaving all but one of the Attorney General's findings undisturbed, held his Order approving the Application invalid, on the basis that Hearst was first required to explore fully the possibility of selling the P-I. App. 40a-47a, 50a. A three-judge panel of the Court of Appeals for the Ninth Circuit, concluding that the Applicants had fully satisfied the requirements of the Act, unanimously reversed the district court and upheld the validity of the Attorney General's Order. No rehearing or stay was sought, and the Applicants implemented the JOA on May 23, 1983.[3]

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[1] For ease of reference, this brief uses the same citation abbreviations as the Petition. *See* Petition at 1-2 n.1. Hearst is a privately-held corporation with a number of subsidiaries, all wholly-owned. Seattle Times Company, of which Blethen Corporation, a privately-held corporation, owns 50.5% of the common voting stock and Ridder Publications, Inc. the other 49.5%, has two wholly-owned subsidiaries. Ridder Publications, Inc. is affiliated with Knight-Ridder Newspapers, Inc., a publicly-held corporation.

[2] The ALJ was Judge Daniel H. Hanscom, former Chief ALJ for the Federal Trade Commission. The Attorney General allowed certain suburban newspaper publishers and groups, most of which are named as Petitioners, to participate in the hearing as intervenors. The Assistant Attorney General in charge of the Antitrust Division was also a party in the hearing, as required by the Regulations under the Act, 28 C.F.R. § 48.10(b), App. 213a, but had no adjudicative function.

[3] The Times now produces, prints and distributes both papers. The P-I's advertising, circulation, production and other commercial departments have been disbanded, except for a small administrative and business staff. Edito-

(footnote continues)

The Petition, although purporting to seek a review of the law applied below, in reality seeks yet another *de novo* factual review, and would require this Court to accept factual premises which have been rejected by the ALJ, the Attorney General, the court of appeals and, for the most part, even the district court.

THE ACT AND ITS BACKGROUND

To qualify for the protection of the Act, which provides an antitrust exemption, JOA's entered into after the Act's passage must be approved by the Attorney General. Prior to granting approval, the Attorney General must determine that one of the papers in the JOA is a "failing newspaper," 15 U.S.C. § 1803(b), App. 202a, defined as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." *Id.* § 1802(5), App. 202a. He must also determine that approval of the JOA "would effectuate the policy and purpose of [the Act]." *Id.* § 1803(b), App. 202a. That "policy and purpose" is set forth in the text of the Act, *id.* § 1801, App. 201a:

> In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this [Act].

The Act was designed to establish a less severe standard than that applied in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), which held that the 1940 JOA between the Tucson newspapers violated the antitrust laws. *See, e.g.*, S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969) [hereinafter cited as Senate Report]. In *Citizen Publishing*, the Court rejected the

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(footnote continued)

rial competition, however, has been preserved, and the P-I's editorial and reportorial staffs remain separate and independent, as required by the Act and the JOA.

newspapers' "failing company" defense because the allegedly failing newspaper had not established the three elements of that defense: (1) that it was on the brink of liquidation, (2) that its prospects of reorganization were "dim or nonexistent," and (3) that there were no available noncompeting purchasers for it. 394 U.S. at 137-38.[4]

Citizen Publishing jeopardized JOA's then in effect in twenty-two cities. Congress was concerned not only with the preservation of editorial competition in those cities, but also with the dramatic decline of newspaper competition in other markets, only forty-five of which still had commercially competitive metropolitan newspapers in 1968. H.R. Rep. No. 1193, 91st Cong., 2d Sess. 4, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3547 [hereinafter cited as House Report]. Attempts to start new metropolitan newspapers in competition with existing newspapers had been uniformly unsuccessful. 116 Cong. Rec. 23,164 (1970) (statement of Rep. Udall). The Act "grandfathered" the pre-existing JOA's (*see* 15 U.S.C. § 1803(a), App. 202a), and provided a less stringent standard under which new JOA's could obtain exemptions from the antitrust laws as applied in *Citizen Publishing*.

The wisdom of Congress in passing the Act has been borne out. When the Application for approval of this JOA was filed in March 1981, only thirty-two of the more than 1500 cities with newspapers still had two or more metropolitan newspapers in commercial competition. Finding 7, App. 74a. Of the nation's fifty-nine largest cities, only sixteen still had such competition. Int. Ex. 283. Washington, D.C. lost its second paper before the hearing, and the early deaths of the second papers in cities such as Philadelphia and Cleveland were forecast at the hearing.[5] Finding 5, App. 73a; Tr. 164, 166. Although the Act has not

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[4] The first two questions presented in the Petition, despite the claim to the contrary (Petition at 15-16 n.12), would introduce these three elements into the Act and thus resurrect the *Citizen Publishing* standard.

[5] Petitioners have brought to the Court's attention their unsuccessful request to the court of appeals to take judicial notice of the recent sale of Hearst's Boston paper. Petition at 15 n.11. In opposing that request, the Applicants asked that if the request were granted, judicial notice should also be taken of the recent closures of the *Philadelphia Bulletin, Cleveland Press* and *Buffalo Courier-Express*.

preserved competing metropolitan dailies in these cities, it has preserved competing papers in more than twenty other cities where the papers have been able to negotiate JOA's, including Chattanooga and Cincinnati, where JOA's have been approved since the Act's passage. The Act now also preserves editorial competition between the two Seattle dailies.

THE MATERIAL FACTS

Petitioners' arguments are based on factual premises that directly conflict with the Attorney General's findings. The hearing produced overwhelming evidence to support his findings to the following effect: national newspaper trends, the economic forces impacting newspaper publishing, and the characteristics of the Seattle market all indicate that the P-I's demise as a commercially separate newspaper is virtually inevitable (Findings 4-23, App. 71a-80a); the P-I's dramatic circulation and advertising declines and its staggering financial losses present a classic picture of a "failing newspaper" (Findings 24-93, 131-36, App. 80a-105a, 125a-126a); losses for the P-I as a separate commercial operation can only be expected to increase (Findings 110-15, App. 112a-117a); based on knowledgeable expert opinion (*see* Findings 118-30, App. 118a-124a), no newspaper has ever been able to reverse a trend like the P-I's and return to profitability (Finding 123, App. 120a-121a); it is not probable that any steps which Hearst or a new owner might try could improve the P-I's prospects (Findings 147-55, App. 131a-135a); and the P-I "has fallen so far behind, *the probability is that its decline is irreversible*" (Finding 144, App. 129a (emphasis added)). Indeed, "[w]ere it not for infusions of capital from Hearst, the probabilities are that the Post-Intelligencer would have failed long ago." App. 139a.

The Attorney General found that Hearst ownership and management were not the source of the P-I's problems (Findings 94-109, App. 105a-112a), and that the conclusion that "new management probably would not improve the P-I's financial prospects" was "amply supported by the record." App. 60a.

These findings have been upheld by the court of appeals. They accurately represent the factual record. By using bits and pieces of evidence out of context, Petitioners try to construct an

alternative factual picture totally at odds with that found by the Attorney General. This attempt cannot alter the stark reality, recognized by Hearst and confirmed by the Attorney General, that without a JOA the P-I's precipitous financial and competitive decline would continue, no matter who owned the newspaper or how it was managed.

SUMMARY OF ARGUMENT

The decision of the court of appeals conflicts with no decision of any other court and decides no important question of federal law which should be settled by this Court. It turns mainly on the facts, which have been found by the trier of fact, based on substantial evidence, to be contrary to the assumptions on which Petitioners base their arguments.

Thus, the record has been found not to support, and is inconsistent with, the claims underlying each of the questions presented by Petitioners (Petition at i-ii): that buyers are available "who could and would continue" the P-I's independent operation (Question 1); that without a JOA "the two newspapers will continue publishing independently" (Question 2); and that "the editorial voices of smaller competing newspapers would be impaired" by the JOA (Question 3; *see also* Questions 4 and 5).

Petitioners' arguments that the Act requires exploration of sale, consideration of closure, and inquiry into competitive impact not only lack factual underpinning, but also are legally defective in that they would read into the clear and explicit language of the Act requirements which Congress did not intend. Petitioners' constitutional arguments, as well, are based on unsupported and incorrect factual premises concerning competitive injury and discriminatory treatment, and are also unsupported by any principle of constitutional law established by the decisions of this Court. Moreover, Petitioners lack standing to raise their constitutional arguments.

REASONS WHY THE WRIT SHOULD BE DENIED

PETITIONERS HAVE FAILED TO PRESENT ADEQUATE REASONS FOR A GRANT OF CERTIORARI

Petitioners show no "special and important reasons" for review by this Court. They cannot argue that the unanimous decision of the court of appeals is in conflict with the decision of any other court, or that the court departed in any way from the usual course of judicial proceedings. *See* Sup. Ct. R. 17.1.

The reasons Petitioners offer for granting the Petition are grounded largely in their antipathy to the Act.[6] They argue that an unfettered application of the antitrust laws is indispensable to a free press (Petition at 7), and that the P-I, as a participant in a JOA, will be a "commercial appendage" to the Times and will cease to be a vigorous editorial voice (*id.* at 7-8). These arguments, discussed briefly below, are irrelevant and are also contradicted by the legislative history of the Act and the record here. More important, since Petitioners' other arguments are predominantly factual rather than legal, the case does not involve "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 17.1(c). This Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

A. The JOA Will Enhance, Not Inhibit, Freedom Of The Press And Competition In Thought And Ideas.

In hopes of attracting the Court's attention, Petitioners suggest that the JOA and the Act itself are antagonistic to a free press and editorial competition. Petitioners are wrong.

The Act was passed because the strict application of the antitrust laws to joint newspaper operating arrangements threatened editorial competition—a kind of competition that

[6] Petitioners repeatedly invoke the rule of construction that exemptions from the antitrust laws should be narrowly construed, as if the mere invocation of this rule were a basis for disapproving the JOA. *See, e.g.*, Petition at 9, 12. The court of appeals succinctly dealt with this contention: "Simply put, we will not emasculate the Act in the guise of narrowly construing it." App. 30a; *see WTWV, Inc. v. National Football League*, 678 F.2d 142, 143 (11th Cir. 1982) ("[C]ourts should interpret statutory language in a way that accomplishes the obvious purpose of Congress . . . .").

the antitrust laws were not designed to protect. As Senator Goldwater stated during Senate debate on the Act:

> If the first amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the public welfare, then surely it is necessary that we pass the pending bill.

116 Cong. Rec. 1795 (1970).[7]

About fifty newspapers are currently published through JOA's, including the metropolitan dailies in San Francisco, St. Louis, Miami, Pittsburgh, Cincinnati, Columbus, Salt Lake City, Nashville and Honolulu. The legislative history contains numerous statements that the failing paper in a JOA, far from becoming "a commercial appendage to its dominant partner" (Petition at 7), may be preserved as a fiercely competitive editorial voice.[8] In the words of Representative Quillen:

> When the cynic says competition will not long survive, he is speculating. When I state that the competition has survived and continues without a sign of diminution, that is fact. . . . Thus the cynic is answered on the basis of experience—that the competition of thoughts and ideas, so essential to our Government, does survive and is preserved by a joint operating arrangement.

116 Cong. Rec. 23,142 (1970).

Petitioners' contention that the P-I's editorial voice would be "severely weakened" by the JOA (Petition at 7-8) is

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[7] *See also* statement of Senator Inouye: "The Newspaper Preservation Act . . . is in the public interest, is consistent with the first amendment to the Constitution, and does no harm to, but is also consistent with the antitrust laws by preserving essential competition—competition in thought and ideas." 116 Cong. Rec. 1786 (1970).

[8] *See e.g.*, 116 Cong. Rec. 1790, 1795, 23,147, 23,158, 23,161, 23,162, 23,163 (1970) (describing vigorous editorial competition between the JOA dailies in Honolulu, Tennessee (Nashville, Knoxville and Bristol), Miami, Evansville, Salt Lake City, St. Louis and El Paso, respectively). Hearst and P-I executives testified at the hearing to their strong commitment to maintain vigorous editorial competition in Seattle (Tr. 1200-01, 2140-41)—competition which is also in Hearst's financial interest since the profits of the JOA, and thus Hearst's share of those profits, depend in large part on the P-I's continued ability to retain and attract readers.

supported only by the speculation of a disgruntled former editor. Tr. 3446-47, 3534-35, 4130-33. Petitioners' mention of the P-I's loss of a separate Sunday edition ignores the fact that under the JOA, six pages in the joint-masthead Sunday product are reserved for P-I editorial material.[9] The newshole (news content in relation to advertising content) formula in the JOA, incorrectly characterized as "restrictive" (Petition at 8, 23), is a necessary part of any JOA, and enhances, rather than restricts, the P-I's news coverage capability. The formula puts the P-I and the Times in parity, with a minimum newshole which exceeds the P-I's average in recent years. The JOA also permits the P-I to increase its newshole beyond the formula if Hearst bears the additional cost. Tr. 1199-200; Hearst Ex. IBQ-BS. As to the alleged "loss of quality employees" (Petition at 8), the JOA does not affect the number of reporters or other editorial personnel at the P-I. If anything, financial security under the JOA will provide the P-I with the opportunity to expand its editorial staff and its news coverage generally.[10]

In short, the JOA enhances and is fully consistent with freedom of the press. It will fulfill the policy and purpose of the Act by preserving for the Seattle community two fully independent and competitive editorial voices where otherwise there would probably be but one.[11]

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[9] Elimination of the P-I's separate Sunday edition is necessary because the Times production facility, like those used by most other JOA's, cannot handle two Sunday morning products.

[10] As the Senate Report points out at pages 3-4: "Allowing newspapers in competitive financial difficulty to work out agreements with a healthy newspaper or another failing newspaper in the same market will give the newspaper under competitive pressure the financial security and stability necessary for independent behavior."

[11] Petitioners' litany of "multiple *per se* violations" of the Sherman Act (Petition at 8-9) is both exaggerated and beside the point. The operative provisions of the JOA are expressly permitted by the Act, 15 U.S.C. § 1802(2), App. 201a, and are typical of the twenty-some other JOA's currently operating throughout the country. Moreover, much of what Petitioners complain of, including joint production and distribution facilities, a joint Sunday paper, optional cost-justified combination advertising rates, the sale of Sunday and combination advertising by a joint entity, and agreement on publication times, is permitted by the antitrust laws even absent the Act. *See United States v. Citizen Publishing Co.*, 1970 Trade Cas. (CCH) ¶ 73,094 (D. Ariz. 1970).

B. The Issues Presented By Petitioners Do Not Warrant This Court's Attention, Since Those Issues Either Are Predicated On Factual Assumptions Rejected Below, Or Are Otherwise Lacking In Merit And Importance.

The issues presented in the Petition do not rise to the level of importance justifying review by this Court. Petitioners stress that this is the first case involving a post-Act JOA to become the subject of a reported court decision, but that is no reason for granting certiorari.[12]

The fact-intensive nature of the decision below militates against certiorari. The court of appeals' reversal of the district court on the "buyer" issue—the subject of Petitioners' lengthiest attack—was based on the determination that the Attorney General was supported by substantial evidence in making the *factual finding* that it is unlikely that new management would be any more successful than Hearst in improving the P-I's financial prospects.[13] App. 21a-22a. The ALJ had recommended a finding that "the evidence does not establish that new management would be any more successful than Hearst and current management of the Post-Intelligencer in returning it to profitability." Finding 109, App. 112a. The Attorney General adopted that finding and, in addition, found that the conclusion that new management would probably not improve the P-I's position was "amply supported by the record." App. 60a. The district court then substituted its own view of the facts and ruled that Hearst had not sustained its burden of showing that new management could not succeed, App. 46a, but the court of appeals reversed, holding:

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[12] In the 13 years since the Act was passed, only three other JOA applications have been filed: Anchorage, Cincinnati and Chattanooga. The Attorney General's decision, as upheld by the court of appeals, is not in conflict with any other administrative decision interpreting the Act. *See, e.g., Recommended Decision of Administrative Law Judge Donald R. Moore in re Application by The Cincinnati Enquirer, Inc., and The E. W. Scripps Co. for Approval of a Joint Newspaper Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. §§ 1801 et seq.*, Department of Justice Docket No. 43-03-24-4 (1979) [hereinafter cited as the *Cincinnati Recommended Decision*]; *see also* App. 9a n.2.

[13] Justice White has written of "the prevailing rule, peculiar to Supreme Court litigation, that once a Court of Appeals has found an agency fact

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> Despite Finding of Fact 109, the district court held that Hearst had not sustained its burden of proving new management could not succeed in turning the P-I around, apparently because Hearst did not respond favorably to purchase inquiries. In light of the existence of substantial evidence in support of Finding of Fact 109, this was in error.

App. 21a.

Petitioners argue that before the factual conclusion can be drawn that a new owner would be unlikely to succeed, the newspaper must be put up for sale and putative buyers must be consulted. *See* Petition at 13. The Attorney General found that he could reach this factual conclusion on the record as it stood, and the court of appeals held that his finding was supported by substantial evidence. App. 21a. This Court's discretionary power of review should not be exercised over such an administrative fact-finding process.

The "buyer" issue is fact-intensive in other respects. Notwithstanding Petitioners' frequent references to "qualified buyers," there were no offers to purchase the P-I, App. 14a; no "buyer" appeared as a witness at the hearing to undergo scrutiny of his background and qualifications; and no "buyer" presented any ideas or plans for improving the P-I's financial or competitive condition. All the information any buyer would need to assess the P-I's prospects had been on public file in Seattle and at the Department of Justice for many months, but no "buyer" came forward to say that he had made such an assessment or that he had even reviewed such information.[14] Although Petitioners argue that buyers will not come forward

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judgment supported by substantial evidence, the case does not merit further review and the appellate function is at an end." White, *Supreme Court Review of Agency Decisions*, 26 Ad. L. Rev. 107, 110 (1974); *see also Appalachian Power Co. v. American Inst. of Certified Pub. Accountants*, 80 S. Ct. 16, 18 (1959) (Brennan, J., in chambers); *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1917).

[14] There is absolutely nothing in the record to support Petitioners' argument or the district court's factual assumption that "[t]here has been no fair opportunity for prospective buyers to prepare and present their plans to make the P-I profitable." Petition at 13; App. 46a.

when the owner expresses an unwillingness to consider sale (Petition at 13), this argument ignores the fact that Hearst stated to the only "buyer" who surfaced during the many months between announcement of the JOA in January, 1981 and the week before the hearing, that Hearst would carefully consider any bona fide offer. Ex. 2 and 4 to Division Ex. 56. Petitioners thus ask this Court to review and reverse a factual finding that no new owner could likely make the P-I profitable, when Petitioners were unable to produce any "buyer" to present evidence to the contrary.

The other questions presented by Petitioners are also fact-intensive. The "closure" issue, Petition at 16-20, is premised on the assumption that without the JOA, the P-I would continue independent operation. As shown more fully below, this assumption is wholly inconsistent with the administrative findings. Similarly, the constitutional and "anticompetitive effects" issues, Petition at 20-30, depend on a showing of possible future competitive injury resulting from the JOA—a showing which the district court correctly characterized as "speculative." App. 48a. Thus, even these issues turn on the facts.

It should also be noted that this is not entirely a case of first impression, as Petitioners claim. Petitioners' First Amendment arguments have been considered and rejected in two reported cases, *Bay Guardian Co. v. Chronicle Publishing Co.*, 344 F. Supp. 1155 (N.D. Cal. 1972); and *City and County of Honolulu v. Hawaii Newspaper Agency, Inc.*, 7 Media L. Rep. (BNA) 2495 (D. Hawaii 1981). But to the extent that this is a case of first impression, the Court should be even more reluctant to review it. *See, e.g., Vasquez v. United States*, 454 U.S. 975, 976 (1981) (Stevens, J., dissenting) ("Often the law develops in a more satisfactory fashion if this Court withholds review of novel issues until differing views have been expressed by other federal courts.").

THE DECISION BELOW IS CORRECT; PETITIONERS ARE UNLIKELY TO PREVAIL ON THE MERITS

Because Petitioners devote so much attention to the merits of the decision below, Respondents are constrained also to address the merits in some detail.[15]

A. Having Established That The P-I's Trend Toward Failure Was Probably Irreversible Under Any Management Or Ownership, The Applicants Were Not Also Required To Show That The P-I Was Available For Sale And That The Sale Alternative Had Been Fully Explored.

Petitioners' factual position on the "buyer" issue is epitomized on page 13 of the Petition, where they purport to describe the holding of the court of appeals:

> This disposition of the matter is in error. It would allow proprietors to gain antitrust exemptions for newspapers which could be operated successfully by others simply by rejecting the available sale alternative out of hand and thus causing their own weak performance, rather than the newspaper's true potential, to become the measure of the publication's future prospects.

The decision below would allow no such thing. As the findings clearly establish, the P-I's financial failure is not the result of "weak performance" by P-I or Hearst management. *See* App. 105a-112a, 143a. The "newspaper's true potential" was the subject of extensive expert and other testimony, reflected in detailed and thorough findings concluding that the P-I has no reasonable prospect of becoming profitable as a commercially competitive newspaper. *See* App. 68a-137a. As the court below stated, the Applicants "sufficiently negated the possibility that . . . alternatives were available in this case," App. 30a, and established that the P-I's "trend toward failure is irreversible *under any management*," App. 22a. When these facts are

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[15] Absent a conflict with decisions of other courts or an important question of federal law, the incorrectness of a decision is an insufficient reason for granting review. *See* Sup. Ct. R. 17.1; *Watt v. Alaska*, 451 U.S. 259, 276 n.5 (1981) (Stevens, J., concurring) ("[O]ur certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases . . . .").

accepted—as they must be—Petitioners' dispute with the court of appeals evaporates.

Petitioners' legal position is epitomized on page 10 of the Petition:

> As under the Bank Merger Act, 12 U.S.C. § 1828, to which Congress referred in enacting the statute at bar, a refusal to explore the alternative of a sale to new ownership precludes the granting of an antitrust exemption.

The Bank Merger Act, as interpreted in *United States v. Third National Bank*, 390 U.S. 171 (1968), requires no such result. In *Third National Bank*, the Court merely concluded:

> [W]e think it was incumbent upon those seeking to merge in this case to demonstrate that they made reasonable efforts to solve the management dilemma of Nashville Bank short of merger with a major competitor but failed in these attempts, *or that any such efforts would have been unlikely to succeed.*

Id. at 189 (emphasis added). That is precisely the test applied by the court of appeals in this case.[16]

Petitioners distort and mischaracterize the legislative history and the factual record.[17] In summarizing and rejecting Petitioners' factual arguments, the ALJ and the Attorney General dealt with them harshly:

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[16] The Attorney General was of the opinion (correctly, Applicants believe) that the Bank Merger Act is not pertinent to proceedings under the Newspaper Preservation Act. Nevertheless, his factual findings were more than sufficient to satisfy the standards of both statutes. It also should be noted that in *Third National Bank*, there had been an explicit factual determination that poor management had been a cause of the bank's condition. 390 U.S. at 188. Such is not the case here.

[17] For example, neither the legislative history (*see* App. 22a n.10) nor the history of the industry supports the proposition that "failing newspapers" cannot be sold. Petition at 10. The now-defunct *Washington Star* changed hands in 1977, and the *Philadelphia Bulletin*, *Cleveland Press* and *Buffalo Courier-Express* all changed hands even more recently. Tr. 141-50, 162, 165-66, 413, 437. Petitioners are also utterly wrong when they assert, at page 14, "Time after time, the record shows, new ownership has brought success to struggling newspapers." Of the nine examples offered, only the Anchorage, San Antonio and Sacramento papers have changed hands in recent memory. According to the expert testimony, the Anchorage paper remains unprofitable, "moreso now than ever," Tr. 440-41, and there is no evidence that the San Antonio or Sacramento papers were "struggling" when they were sold. In

(footnote continues)

> Essentially, the Intervenors [Petitioners] and the Antitrust Division point to the "morning advantage," the correction of internal problems such as the "suburban conversion," decrease in "downroutes," allegedly more aggressive staff, recent (small) gains in circulation, assertions of former Post-Intelligencer employees that the Post-Intelligencer can succeed, criticism of past management of the paper, and the like, to justify their assertions that the Post-Intelligencer's future is "bright," that it has turned the corner and a little more time will return it to profitability, and that other newspapers have overcome declines and the Post-Intelligencer can do likewise. These Pollyanna-like assertions are not based on anything really tangible. In 1981 the Post-Intelligencer is suffering its second worse year since 1969. Losses are running at the $2,663,120 level, one million dollars more than 1980 (Hearst 77C, 44A). The optimism of the Intervenors and the Antitrust Division is founded on little more than hopeful speculation and conjecture, ungrounded in reality. Nothing has happened to justify such assertions and optimism. They lack credibility or persuasiveness in comparison with the 13 years of steady downward trend, continuing to the present, of the Post-Intelligencer in all its vital signs.

Finding 146, App. 130a. Petitioners now present the same factual arguments to this Court. *See* Petition at 19.

The sparse record with respect to "would-be buyers" is accurately and completely summarized by the court of appeals, App. 14a n.5, and need not be discussed further here.[18] More to the point, there is no conceivable reason why "*different* management . . . should be tried" merely for the sake of experimentation. *See* Petition at 19 n.13. If, on the record as a whole, it is probable that the P-I cannot be made profitable—whether under the ownership of Hearst or of anyone else—sale cannot be an "alternative solution," and the issue of

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(footnote continued)

fact, according to the testimony, no newspaper has ever been able to pull out of a "downward spiral" similar to the one affecting the P-I. Tr. 277.

[18] The court noted that no offers for the P-I had been received, only "inquiries." App. 14a. In fact, the record does not even support Petitioners' pivotal claim that those making *current* "inquiries" were "rebuffed." *See id.* n.5.

whether the P-I can be sold becomes irrelevant.[19] Since the Attorney General and the court of appeals both found that the record "amply supports" such a conclusion, App. 60a; 22a, that conclusion disposes of the "buyer" issue.

B. The Applicants Were Not Required To Show That Closure Had Been Considered In The Event The JOA Were Denied.

Petitioners contend that the Act requires the Applicants to show the P-I is "in practical danger of closing," Petition at 16, and that no such showing has been made here. Again, Petitioners misread—or attempt to side-step—the factual findings. Although the Act does not require proof of probable closure,[20] the ALJ and the Attorney General made findings more than sufficient to satisfy such a requirement, even if it existed. As the district court recognized, "the ALJ did actually consider and apply 'the likelihood of actual closure' factor in applying the 'probable danger of financial failure' test." App. 46a.[21] The district court further observed, "The issue before the court, therefore, is not the correctness of the legal standard, but whether the evidence in the record supports the ALJ's conclusion." App. 46a-47a. At every level of the proceedings below, it was determined that the ALJ's conclusion was amply supported by the record.

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[19] Although non-salability is not an element of the standard in the Act, the Attorney General was clearly correct in rejecting as speculative the ALJ's proposed finding that the P-I could be sold. App. 60a n.*; *see* App. 13a-15a.

[20] Contrary to the assertion at pages 9-10 of the Petition, the Act is not "a last resort to prevent the actual closure of a newspaper." Rather, the Act is designed to permit a newspaper to enter into a JOA while its competitor is still willing to agree to one, and before it has been "led . . . to the crisis point demanded by the failing company doctrine. . . ." *Hearings on H.R. 279 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 12 (1969) (statement of Rep. Matsunaga). The "last resort" would be a fire sale for the value of the paper's equipment and real estate.

[21] The ALJ concluded:

> If the Post-Intelligencer were a free standing, separate and independent newspaper, not owned by Hearst [the standard by which the Act requires a failing newspaper to be evaluated], *the record in this proceeding is sufficient to prove that it would be in probable danger of closure.* In view of the annual losses it has sustained since 1969, the evidence establishes that *it probably could not have continued to exist.*

(footnote continues)

Petitioners assert that "[t]he Court of Appeals has recognized that Hearst or a successor will continue to operate the P-I competitively if the exemption is denied . . . ." Petition at 17. The court of appeals did no such thing, but rather merely accepted, "[f]or purposes of this issue, . . . [Petitioners'] assertion that Hearst never considered closing the P-I, even should the joint operating agreement not be allowed." App. 23a.[22]

To try to bolster their "probable closure" argument, Petitioners resurrect the "incremental analysis" issue urged at the hearing by the Antitrust Division [23] and rejected by the ALJ and the Attorney General as impermissible under the Act.[24] This issue is not properly before this Court. It was not referred to in Petitioners' Complaint, and the district court expressly noted that it had not been raised. App. 40a n.2.[25]

(footnote continued)

> Were it not for infusions of capital from Hearst, the probabilities are that the Post-Intelligencer *would have failed long ago.*

App. 139a (emphasis added). Hearst's President testified that without the JOA, the P-I would "at some early time cease to operate." Tr. 2198.

[22] Although Petitioners stress Hearst's failure to "consider closing" the P-I, Hearst's reasons were obvious (and totally different from those advanced at page 19 of the Petition): there was no need to consider closing the P-I because Hearst had been able to agree with the Times on a JOA and believed that it would be approved.

[23] As noted earlier, the Regulations make the Assistant Attorney General in charge of the Antitrust Division a party in the hearing, 28 C.F.R. § 48.10(b), App. 213a, but give him no adjudicative function. His "opinions are not law," *Shafer v. Bulk Petroleum Corp.*, 5 Trade Reg. Rep. (CCH) (1983-2 Trade Cas.) ¶ 65,586 at 68,909 (E.D. Wis. Aug. 15, 1983), and are entitled to no more weight than those of the other parties.

[24] The Cincinnati ALJ also determined that incremental analysis was not permitted by the Act. *Cincinnati Recommended Decision* at 131.

[25] It might be noted that incremental analysis, which assumes that valuable services should be provided to the P-I by Hearst free of charge, is merely a variant of the "deep pocket" doctrine, and that its application would violate the "regardless of ownership or affiliations" language of 15 U.S.C. § 1802(5). Moreover, when properly and completely applied in accordance with the testimony of the Division's accounting expert, the analysis shows that Hearst derives no "net benefit" whatever from the operation of the P-I, but rather a substantial "net detriment." Tr. 2583-84, 2588; DSER at 341, 344; *see* App. 112a-115a, 147a-149a.

C. The Act Requires No Inquiry Into The Competitive Impact Of The JOA Or Its Provisions.

Petitioners argue that a proposed JOA cannot be found to "effectuate the policy and purpose" of the Act unless the applicants first demonstrate that it will not injure competing media and that it has been structured in the least "anticompetitive" form possible. Both branches of this argument are devoid of legal foundation, ignore the clearly expressed congressional intent, and have been rejected by the ALJ, the Attorney General, the district court, the court of appeals, and even the Antitrust Division.[26] As the court of appeals said, the Act embodies "a policy determination that the preservation of editorial diversity through joint operating agreements outweighs any potentially anticompetitive effects this antitrust exemption might cause." App. 26a.

Congress considered the possible effects a JOA might have on other media, but chose to protect such media by section 4(c) of the Act, 15 U.S.C. § 1803(c), App. 203a, which subjects a JOA to all pertinent antitrust statutes except as specifically exempted in the Act. That Congress thought no other protection was necessary is made clear by the Senate Report, which states at page 5, "Section 4(c) is to protect the competitive position of newspapers which share the market with a joint operating arrangement." The court of appeals correctly called section 4(c) "an important safeguard." App. 26a. There is no legal support whatever for the proposition that the Attorney General should have considered the JOA's p tential effect on other media. *See* App. 26a-27a n.11.

Petitioners' claim of harm, aside from being irrelevant, is not supported by the record. Petitioners charge that the "editorial voices of the smaller newspapers" will be "substantially diminished or silenced" by the JOA, and claim that "the record here shows unmistakably that neighborhood and subur-

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[26] *See, e.g.*, App. 27a; 47a-48a; 143a-145a, 149a-150a; Transcript of Prehearing Conference of Oct. 6, 1981 at 51, CR 100. It should be noted that the Regulations do not contemplate consideration of such issues, and do not require that the material to be submitted with a JOA application include any information concerning effects on competing media or the possibility of a less "anticompetitive" form of JOA. *See* 28 C.F.R. § 48.4.

ban newspapers will be harmed."[27] Petition at 21. But Petitioners' only evidence was the testimony of representatives of two suburban publishers, both of which would benefit from closure of the P-I. Their papers have been experiencing rapid, multifold growth in the recent past. Tr. 3350, 3359, 3362-63, 3983, 3987. Neither of the witnesses professed to have any knowledge of what effect, if any, JOA's in other cities have had on suburban papers, Tr. 3345-46, 3988, and their testimony as to what they thought would happen in Seattle was nothing but untutored supposition. The district court correctly characterized Petitioners' assertion of harm as "speculative." App. 48a.[28]

Petitioners argue that if the JOA "is *unnecessarily* destructive of competition between the two applicants, it should clearly be disapproved."[29] Petition at 23. But there is no claim that the JOA goes beyond the scope of the activities which are expressly permitted by the Act. *See* 15 U.S.C. § 1802(2), App. 201a. As the Senate Report states at page 4, "The lawful conduct that parties to a joint arrangement may engage in is stated [in the Act] with particularity." Congress wisely reserved to the newspapers involved, not to the Attorney General (or to a group of self-interested competitors), the decision as to which of the permitted activities would be appropriate, workable and adequate in a given situation. Nothing in the Act or its

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[27] In connection with Petitioners' claim of harm, it is worth noting that Valley Publishing Company, the owner of three of the four suburban daily newspapers originally involved in this case, has withdrawn. Petition at 5 n.3. Although Valley may have been "dissolved" as a corporate entity, as Petitioners claim, the newspapers it published in the P-I's primary marketing area remain very much alive under new ownership.

[28] Petitioners mistakenly say that "[t]he Court of Appeals, similarly, has assumed that smaller editorial voices *would* be injured . . . ." Petition at 22 (emphasis added). At most, the court said that, assuming *arguendo* that the JOA would have anticompetitive ramifications, Congress has decided that "those possibly harmful effects were outweighed by other considerations . . . ." App. at 28a. It might also be noted that a study presented to the district court in connection with a preliminary motion indicated that suburban papers in other markets are not injured by JOA's. DSER 453-61.

[29] Petitioners presented no evidence to support the claim that a lesser form of JOA could preserve the P-I. In fact, the JOA contains no more than what is common in other JOA's. The suggestion that the JOA is atypical in its duration, Petition at 23, ignores the fact that the Albuquerque JOA is now 50 years old. *See* House Report at 4, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3547, 3549.

comprehensive legislative history even hints that the Act requires a search for the theoretically least anticompetitive form of JOA that would permit the failing paper to survive.[30]

D. The Act Does Not Violate The First Amendment.

As both courts below properly recognized, the Act regulates economic conduct, not freedom of the press. Nonetheless, Petitioners have made two First Amendment arguments: (a) that the Act is unconstitutional as applied because it grants to the Applicants an antitrust exemption which the publisher-Petitioners do not have (even though they have not applied for the exemption); and (b) that the Act is unconstitutional on its face because it gives administrative discretion to the Attorney General in granting the exemption. The court of appeals' rejection of both arguments is in total accord with the decisions of all other courts to address those arguments, and does not conflict with any decisions of this Court. Moreover, Petitioners lack standing to raise either argument.

1. Petitioners lack standing.

Standing is a fundamental principle that requires a party alleging unconstitutionality to show that he has suffered "injury in fact" caused by the challenged governmental action, and that a "nexus" exists between that injury and a constitutional or statutory guarantee which protects him. *Warth v. Seldin*, 422 U.S. 490 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152-53 (1970). Petitioners cannot satisfy either of these requirements.

Petitioners' first argument—that the Act is unconstitutional as applied—depends upon an allegation that the "effect" of the Attorney General's Order will be to harm the competitive

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[30] Paul Rand Dixon, then Chairman of the FTC, unsuccessfully complained that the Act "does not require inquiry into the adequacy of [a] less restrictive alternative before a more restrictive arrangement is arrived at." *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 3094 (1968); *see also* Senate Report at 10 (letter from Mr. Dixon) ("There is no discretionary authority to prohibit . . . [a JOA] . . . that imposes excessive and unnecessary anticompetitive restrictions." "There is no provision . . . for a [JOA] to be terminated once the failing partner has recovered his economic health.").

position of the suburban publisher-Petitioners. The competitive "injury in fact" alleged by them, however, is purely speculative, without credible support in the factual record. *See* App. 48a; *cf. Warth v. Seldin*, 422 U.S. at 505-07 (plaintiffs must show a causal connection between governmental action and injury in fact); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39-40 (1976) (no standing where there is only a speculative causal relationship between government action and alleged injury in fact).[31] Petitioners have also failed to show the requisite "nexus" between the alleged competitive injury and the First Amendment, which does not provide protection from incidental economic harm resulting from governmental action. *See Associated Press v. United States*, 326 U.S. 1 (1945); *Associated Press v. NLRB*, 301 U.S. 103 (1937). Moreover, Petitioners ignore the protection afforded by the Act itself, which expressly provides that predatory conduct is not exempted from the antitrust laws by the Act. *See* 15 U.S.C. § 1803(c), App. 203a.[32]

Petitioners' second constitutional argument requires them to represent parties who are not before this Court, namely, the imaginary publishers who *might* apply for antitrust exemptions under the Act and whose applications *might* be denied by the Attorney General because of improper political motivations. Such conjectural claims on behalf of unknown (and probably nonexistent) third parties are routinely rejected by this Court for lack of standing. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488 (1974) (plaintiffs held to lack standing because they were unable to point to actual or imminent criminal prosecutions against them). The Petition should be denied, among other reasons, because Petitioners lack standing with respect to the constitutional issues.

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[31] Indeed, the JOA, which will enable the P-I to survive, may only prevent the suburban newspapers from gaining a competitive *advantage* from the P-I's failure. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-90 (1977).

[32] Because Petitioners' alleged future injuries are only speculative, the Court is presented with no factual record upon which it could base an analysis of the protection afforded by 15 U.S.C. § 1803(c).

2. No conflict exists between the decision below and the decisions of this or any other court.

Petitioners stress that this is the first case challenging the constitutionality of the Act to reach this Court, but fail to show how this fact militates for a grant of the Petition rather than against it. This Court is not constrained to pass upon the constitutionality of all acts of Congress; indeed, constitutional issues are to be avoided, if possible. *Alma Motors v. Timken Co.*, 329 U.S. 129, 136 (1946). This is especially so where, as here, there is a total absence of any conflict between the decision below and the decisions of this or any other court.

Opponents of other JOA's have raised the same constitutional arguments raised here, and have consistently met with failure. The court of appeals correctly agreed "with the district court's rejection of [Petitioners'] assertion that these cases are distinguishable because the plaintiffs there were challenging preexisting joint operating agreements." App. 28a.

In *City and County of Honolulu v. Hawaii Newspaper Agency, Inc.*, 7 Media L. Rep. (BNA) 2495, 2498 (D. Hawaii 1981), the court rejected the claim that the Act abridges freedom of the press:

> It should be noted that freedom of the press is, of course, constitutionally mandated; whereas, antitrust laws are creations of Congress. Such congressional enactments may be withdrawn or repealed in their entirety without creating any impact upon the first amendment. I conclude that limited withdrawal of anticompetitive protection, which the [Act] affords, does not abridge the freedom of the press.

Similarly, in *Bay Guardian Co. v. Chronicle Publishing Co.*, 344 F. Supp. 1155, 1158 (N.D. Cal. 1972), the court held:

> Here the Act was designed to preserve independent editorial voices. Regardless of the economic or social wisdom of such a course, it does not violate the freedom of the press. Rather it is merely a selective repeal of the antitrust laws. . . .

> Such a repeal, even when applicable only to the newspaper industry, does not violate the First Amendment.

Bay Guardian also rejected the argument that the Act somehow conveys a government license:

> Much of plaintiffs' argument seems directed at a phantom Act which conveys a government license to monopolize to certain newspapers at the expense of others. Whatever might be the constitutional status of such an Act, it is not the one now before us. The Act pertinent to this case does not confer any license to monopolize and indeed has a specific provision prohibiting "predatory practices" (§ 1803(c)).

Id. at 1157-58. Both courts rejected the argument advanced by Petitioners here that the Act's exemption is not available to all newspapers. *Hawaii Newspaper Agency*, 7 Media L. Rep. at 2498; *Bay Guardian*, 344 F. Supp. at 1158; *see* App. 29a ("[T]here is no question that other newspapers in the Seattle area, large or small, may participate in a joint operating agreement if they qualify.").

Although Petitioners must concede that there is no direct conflict between the decision below and the opinions of this Court, they suggest that the reasoning of the recent holding in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 75 L. Ed. 2d 295 (1983), supports their claims. The suggestion cannot withstand analysis.

In *Minneapolis Star*, the Court held that differential application of a state's *taxing power* to newspapers was unconstitutional under the First Amendment where no special circumstances justified such treatment. Central to this holding was the historically-based understanding that the power to tax the press is akin to the power to censor or license the press. *See* 75 L. Ed. 2d at 303-05; *Grosjean v. American Press Co.*, 297 U.S. 233, 244-45 (1936) (noting a special concern under the First Amendment with "taxes on knowledge"). This understanding was based, in part, on the beliefs and experiences of those supporting the enactment of the First Amendment that devices such as the Stamp Tax or other "taxes on knowledge" could be used by the government to control or limit freedom of the press.

See Minneapolis Star, 75 L. Ed. 2d at 303, 304; 1 B. Schwartz, The Bill of Rights: A Documentary History 466, 474, 527, 566, 575-76 (1971) (indicating an awareness by both Federalists and Anti-Federalists of the dangers of taxes on publication or circulation). The *Minneapolis Star* holding cannot be divorced from this special protection from such taxes, comparable only to the protection from prior restraints, intended by those responsible for adoption of the Bill of Rights. *See Minneapolis Star*, 75 L. Ed. 2d at 304 n.6; *Grosjean*, 297 U.S. at 244-45. This historically-based solicitude does not apply to an Act creating a limited antitrust exemption that is available to *all* newspapers. There is simply no comparable history of governmental abuse of such a regulatory exemption.

Minneapolis Star was dependent as well on the complete absence of legislative history establishing any substantial basis for the disparate treatment of newspapers. *See* 75 L. Ed. 2d at 301 n.3, 302, 303, 305. Here, in contrast, the Court is asked to review the constitutionality of an Act which is supported by a lengthy legislative history, replete with explanations of the special economic characteristics of the newspaper industry that, absent the Act's exemption, cause the loss (without replacement) of failing newspapers. *See, e.g.*, Senate Report at 4 (special characteristics of newspaper industry relating to failing company doctrine); 116 Cong. Rec. 1786-87 (1970) (statement of Sen. Bennett) (unique characteristics of newspaper industry); 116 Cong. Rec. 1785-86 (1970) (statement of Sen. Inouye) (downward cycle of losses in circulation and losses in advertising).

Finally, and most telling, *Minneapolis Star* involved a taxing statute that, on its face, applied only to a small number of newspapers, and had no counterpart elsewhere in Minnesota's taxing scheme. *See* 75 L. Ed. 2d at 299, 300.[33] As much as Petitioners would suggest otherwise, the Act is nothing like the Minnesota scheme. The Act, on its face, provides an

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[33] Petitioners conveniently ignore that *Minneapolis Star* did not overturn the underlying state *exemption* of newspapers from the sales tax, similar to the exemption from the antitrust laws available through the Act. This reflects the basic fallacy in Petitioners' claims. In essence, they suggest that the

(footnote continues)

exemption that is available to any newspaper that can show it is in probable danger of financial failure—available, in short, to newspapers of all sizes and persuasions. Like its many counterparts in other exemptions from the antitrust laws, the Act abridges no First Amendment freedoms. The decision below in no way conflicts with *Minneapolis Star*.

3. The Act is not unconstitutional on its face.

Petitioners rely upon a patchwork collection of inapposite cases for the proposition that the Act grants unconstitutional "licensing power" to the Attorney General subject to overly vague standards. Petition at 27, 29. The claim appears to be that the decision below conflicts with the opinions of this Court in cases such as *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), and *Lovell v. City of Griffin*, 303 U.S. 444 (1938). This claim is without merit.

The fundamental error in Petitioners' reliance on such cases is the assumption (rejected by both the court of appeals and the district court, as well as by *Bay Guardian*, 344 F. Supp. at 1158) that the Act involves the Attorney General in a "licensing" activity in some First Amendment sense of the term. Licensing, as this Court has made clear, has the same meaning as a prior restraint or system of censorship whereby the press must, in advance, seek government permission to publish or speak. *See, e.g., Shuttlesworth*, 394 U.S. at 150-51 (holding unconstitutional "a law subjecting the exercise of First Amendment freedoms to the *prior restraint of a license*") (emphasis added). The Act, unlike the statutes challenged in *Shuttlesworth* and *Lovell*, does not require government permission to publish or speak; it merely allows a financially distressed newspaper to seek an exemption from the antitrust laws if it can meet well-defined statutory requirements.

(footnote continued)

government cannot act to protect freedom of the press by an exemption from the governmentally-created antitrust laws, even though strict enforcement of those laws may lead to the loss of editorial voices. Such a suggestion disregards the very words of the First Amendment, precluding the government from "abridging" freedom of the press, but not from enhancing it. T. Emerson, The System of Freedom of Expression 414, 415 (1970) (a law must *abridge* freedom of the press in order to violate the First Amendment); *see also Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (citing the Act as an example of proper government action which enhances First Amendment freedoms).

Those statutory requirements are more than sufficient to meet the standards of specificity applied by this Court in cases which do (unlike the present case) involve First Amendment issues. Petitioners appear to concede that the "probable danger of financial failure" requirement is sufficiently specific, but claim that the requirement that a JOA "effectuate the policy and purpose" of the Act, 15 U.S.C. § 1803(b), App. 202a, is overly vague. The latter requirement, although it might appear somewhat non-specific if the rest of the Act were disregarded, is made explicit by the first section of the Act, *id.* § 1801, App. 201a, which carefully delineates the congressional "policy and purpose" of maintaining editorial and reportorial independence and preserving newspapers in economic distress. *Cf. Arnett v. Kennedy*, 416 U.S. 134, 161 (1974) (approving standard for dismissal of an employee "for such cause as will promote the efficiency of the service").

Finally, Petitioners' lack of standing is particularly acute in this branch of their constitutional argument. They have not applied for an exemption under the Act and cannot allege that they would be improperly denied an exemption if they did apply; thus, they seek to protect the interests of imaginary third persons. *Cf. O'Shea v. Littleton*, 414 U.S. 488 (1974) (no standing where plaintiffs themselves were not subject to actual or imminent prosecution). Because the Act involves "conduct and not merely speech," Petitioners cannot rely on the overbreadth doctrine to avoid the fundamental requirement of standing. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) ("[T]he overbreadth of [such] a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."); *New York v. Ferber*, 73 L. Ed. 2d 1113, 1130-33 (1982) (the legislation in question must reach a "substantial number of impermissible applications").

The court below properly concluded that Petitioners' constitutional arguments were without substance. There being no conflict with the decisions of this or other courts, those arguments do not warrant the grant of certiorari.

CONCLUSION

Petitioners cling to a view of the facts which is radically different from the facts as found by the Attorney General and upheld unanimously by the court of appeals. The fact-intensive nature of Petitioners' contentions, the lack of conflict among the circuits, and the failure to present any legal question deserving of review by this Court compel denial of the writ. Accordingly, Respondents The Hearst Corporation and Seattle Times Company urge the Court to deny the Petition for writ of certiorari.

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Dated: September 19, 1983.